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Mea Culpa: Why Corporate Waivers of Attorney-Client Privilege Have Not Increased the Prosecution of Corporate Executives

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MEA CULPA: WHY CORPORATE WAIVERS OF ATTORNEY-CLIENT PRIVILEGE HAVE NOT INCREASED THE PROSECUTION OF CORPORATE EXECUTIVES

Abstract: Up until the most recent financial crisis, the Justice Department consistently prosecuted individuals responsible for corporate misconduct. In recent times, few executives are prosecuted for their vast corporate misconduct and most received a deferred prosecution agreement in exchange for waiving the corporation's attorney-client privilege. This Note discusses how the waiver of attorney-client privilege has, in effect, reduced the prosecution of executives responsible for corporate crimes. It argues that the Justice Department must conduct its own investigations into corporate misconduct and should not rely on a corporation waiving its attorney-client privilege in exchange for a lenient deal. Successfully reducing corporate misconduct depends, in part, on the government's ability to deter the individuals running the corporation, which cannot be met when leniency replaces investigative work.

INTRODUCTION

2001: the sixth largest energy company in the world, Enron, revealed it overstated its earnings by hundreds of millions.[1] Twenty-thousand people lost their jobs and twenty-four executives were convicted as a result of this scandal.[2] Jeffrey Skilling, Enron's former chief executive officer (CEO), and Andrew Fastow, Enron's former chief financial officer (CFO), were sentenced to twenty-four years and six years in prison respectively.[3] 2004–2005: World-

[1] *See Enron Fast Facts*, CNN (Apr. 27, 2017), https://www-m.cnn.com/2013/07/02/us/enron-fast-facts/index.html [https://perma.cc/5T7S-EZGM] (explaining the Enron scandal).

[2] *See 10 Years Later: What Happened to the Former Employees of Enron?*, BUS. INSIDER (Dec. 1, 2011), https://www.businessinsider.com/10-years-later-what-happened-to-the-former-employees-of-enron-2011-12 [https://perma.cc/9Y5L-XMPM] (describing the consequences of Enron's collapse); Scott Cohn, *Some Enron Victims Still Trying to Recover—Massive Fraud Left Major Damage in Its Wake for Employees, Charities*, CNBC (May 26, 2006), http://www.nbcnews.com/id/12976443/ns/business–cnbc_tv/t/some–enron–victims–still–trying–recover/#.WoHdW5M–cdU [https://perma.cc/5W6B-EZRG] (noting former Enron employees are still suffering as a result of Enron's demise).

[3] *See* Kate Murphy & Alexei Barrionuevo, *Fastow Sentenced to 6 Years*, N.Y. TIMES (Sept. 27, 2006), https://www.nytimes.com/2006/09/27/business/27enron.html [https://perma.cc/RP9D-B7Q8] (explaining the fate of Enron's former CFO). Andrew Fastow, Enron's former CFO, was given a six-year plea deal for his cooperation in the trial against Kenneth Lay and Jeffrey Skilling. *See id.* Jeffrey Skilling was sentenced to twenty-four years in prison but reached a deal with the Justice Department in 2013 to end the years of appeals that reduced his sentence to fourteen years. *See* Kristen Hays & Anna Driver, *Former Enron CEO Skilling's Sentence Cut to 14 Years*, REUTERS (June 21, 2013),

Com's accounting fraud was discovered, investors lost tens of billions of dollars, thousands of employees were left without jobs and medical benefits, and WorldCom filed for the largest bankruptcy in American history.[4] Ex-WorldCom CEO, Bernard Ebbers was sentenced to twenty-five years in prison and ex-WorldCom CFO, Scott Sullivan, was sentenced to five years in prison.[5] Sullivan's sentence was half the length of Enron's former CFO's sentence and twenty years less than WorldCom's CEO's sentence due to Sullivan's cooperation with the government.[6]

2007–2008: The financial markets collapsed due in large part to faulty subprime mortgages.[7] Millions of people lost their jobs and life savings, and the fallout of the crisis cost the global economy trillions of dollars.[8] Banks such as Wells Fargo, J.P. Morgan Chase, Citigroup, Bank of America, Goldman Sachs, HSBC, MetLife Bank, and Ally Financial paid fines of over $150 billion for their roles in selling fraudulent mortgages and making misrepresen-

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https://www.reuters.com/article/us-enron-skilling-idUSBRE95K12520130621 [https://perma.cc/Z6ED-MLS9] (describing how Jeffrey Skilling's sentence was reduced).

[4] *See* Jennifer Bayot & Roben Farzad, *Ex-WorldCom Executive Sentenced to 5 Years in Accounting Fraud*, N.Y. TIMES (Aug. 12, 2005), https://www.nytimes.com/2005/08/12/business/exworldcom-officer-sentenced-to-5-years-in-accounting-fraud.html [https://perma.cc/9MAR-U8MZ] (emphasizing the dire situation Enron employees were left in following the collapse of the company); Terry Frieden, *Ebbers Indicted, Ex-CFO Pleads Guilty*, CNN MONEY (Mar. 2, 2004), http://money.cnn.com/2004/03/02/technology/ebbers/ [https://perma.cc/F3U9-YTWM] (explaining the fraudulent overstatement by WorldCom caused the largest bankruptcy in American history). WorldCom overstated revenue and minimized its expenses in what amounted to an $11 billion fraud scheme. *See* Frieden, *supra* (describing the magnitude of the WorldCom scandal).

[5] *See* Bayot & Farzad, *supra* note 4 (detailing the sentences the WorldCom executives received for their roles in WorldCom's fraud); Frieden, *supra* note 4 (describing WorldCom's former CFO's sentence). WorldCom was once the country's second-largest phone carrier. *See* Bayot & Farzad, *supra* note 4 (explaining WorldCom's business). Under Ebbers' and Sullivan's leadership, employees were directed to overstate revenue and conceal expenses. *See id.* (noting how the WorldCom fraud was perpetuated). This scheme ultimately resulted in an $11 billion fraud that led to the company's demise and subsequent bankruptcy. *See* Frieden, *supra* note 4 (detailing WorldCom's fraud). Four other former executives were prosecuted as a result of the WorldCom scandal but received lighter sentences because of their cooperation with the government in building its case against Bernard Ebbers, the former CEO. *See* Bloomberg News, *Ex-WorldCom Controller Sentenced to One Year*, N.Y. TIMES (Aug. 11, 2005), https://www.nytimes.com/2005/08/11/business/exworldcom-controller-sentenced-to-one-year.html [https://perma.cc/4DVZ-L6VU] (commenting on the sentences that the former executives at WorldCom received). The four executives received sentences ranging from probation to one year and one day in prison. *See id.* (describing the different lengths of sentences the former WorldCom executives received).

[6] *See* Bayot & Farzad, *supra* note 4 (noting Sullivan's sentence is more lenient than Enron's former CEO received).

[7] *See* Noah Rayman, *Here's How Much Banks Have Paid Out Since the Financial Crisis*, TIME (Aug. 21, 2014), http://time.com/3154590/bank–payouts–since–financial–crisis/ [https://perma.cc/L5JP-P5CB] (explaining the financial market collapse).

[8] *See* Joseph L. Zales, *$22 Trillion Lost, Zero Wall Street Executives Jailed: Prosecutors Should Utilize Whistleblowers to Establish Criminal Intent*, 6 NOTRE DAME J. INT'L & COMP. L. 167, 167 (2016) (describing the consequences of the financial crisis).

tations about complex investments.[9] Yet, unlike Enron, only one Wall Street executive was convicted for his role in the crisis—the rest of the executives walked away unscathed.[10]

2012: Federal investigators discovered that HSBC transferred billions of dollars for nations under sanctions by the United States, accepted money from a Saudi Arabian bank associated with terrorists, and allowed the Mexican drug cartel, Sinaloa, to launder money through the American financial system.[11] In total, HSBC allowed, at a minimum, $811 billion of drug cartel money to be laundered through HSBC bank accounts.[12] Yet, once again, unlike Enron and WorldCom, not one of HSBC's executives faced criminal charges.[13] All of HSBC's executives escaped with nothing but a promise to clean up their corporate culture and a fine of nearly $2 billion against the corporation.[14]

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[9] *See* Rayman, *supra* note 7 (noting the fines that large banks paid for their roles in the 2008 financial crisis). In February 2012, Wells Fargo, J.P. Morgan Chase, Citigroup, Bank of America, and Ally Financial agreed to a $25 billion settlement relating to their foreclosure techniques. *See id.* (explaining the settlements that large banks made). In November 2013, J.P. Morgan Chase entered into a $14 billion settlement with the Justice Department for "knowingly bundl[ing] toxic loans and sell[ing] them to unsuspected investors." *See id.* (demonstrating the details in the settlements that large banks made in the aftermath of the financial crisis). In January 2013, March 2014, and August 2014, Bank of America entered into a $11.6 billion, $9.5 billion, and $16.65 billion settlement related to its faulty mortgages and selling them to Fannie Mae. *See id.* (detailing the fines Bank of America paid).

[10] *See* Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES MAG. (Apr. 30, 2014), https://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html [https://perma.cc/7LD6-PUDL] (detailing that Kareem Serageldin, a mid-level executive at Credit Suisse, was the only executive who went to jail as a result of the financial crisis). Serageldin ultimately pled guilty to conspiracy to falsify books and records. *See* Bernard Vaughan, *Ex-Credit Suisse Trader Pleads Guilty in U.S. Mortgage Case*, REUTERS (Apr. 12, 2013), https://www.reuters.com/article/us-creditsuisse-serageldin-plea/ex-credit-suisse-trader-pleads-guilty-in-u-s-mortgage-case-idUSBRE93B0SI20130412 [https://perma.cc/574F-F3G3] (explaining the plea deal Serageldin took). Serageldin, a British citizen, allegedly covered Credit Suisse's losses on subprime mortgage-backed bonds by inflating their prices. *See id.* (providing background on the Credit Suisse employee that went to jail).

[11] *See* Eisinger, *supra* note 10 (explaining HSBC's transgressions); Patrick Radden Keefe, *Why Corrupt Bankers Avoid Jail*, NEW YORKER (July 31, 2007), https://www.newyorker.com/magazine/2017/07/31/why-corrupt-bankers-avoid-jail [https://perma.cc/W48K-8FJM] (noting the allegations that HSBC faced from federal investigators in 2012). The federal investigations into HSBC's conduct were performed by Senate investigators. *See* Keefe, *supra*.

[12] *See* Dominic Rushe & Jill Treanor, *HSBC's Record $1.9bn Fine Preferable to Prosecution, US Authorities Insist*, THE GUARDIAN (Dec. 11, 2012), https://www.theguardian.com/business/2012/dec/11/hsbc-fine-prosecution-money-laundering [https://perma.cc/PB3R-8P5H] (detailing the HSBC scandal). Some of the egregious conduct the bank took to assist in laundering drug cartel money was increasing the size of windows at some of the branches so that more cash could fit through them. *See id.* (detailing HSBC's conduct).

[13] *See* Keefe, *supra* note 11 (explaining no criminal charges were filed against HSBC and no executives were prosecuted).

[14] *See id.* (describing how HSBC laundered drug cartel money). The fine of almost $2 billion to HSBC may seem like a significant amount of money but equated to one month's worth of profit to HSBC. *See id.* (explaining how much profit HSBC made). The fine comprised of a $1,256,000,000 forfeiture and an agreement to pay $665,000,000 in civil penalties. *See* Aruna Viswanatha & Brett

2016: Executive culpability looked to be a relic of the past when, despite an admission of widespread fraud, Wells Fargo executives evaded all criminal consequences for their fraudulent corporate culture.[15] Wells Fargo admitted that its employees fraudulently opened 1.5 million fictitious checking accounts and half a million fictitious credit cards.[16] Later that same year, Wells Fargo discovered an additional 1.4 million fake accounts, making its total fictitious accounts over 3.5 million.[17] Wells Fargo acknowledged its employees fraudulently charged thousands of customers overdraft and maintenance fees for accounts they never opened and unfairly repossessed over twenty-thousand account holders' cars.[18] Wells Fargo fired over five-thousand employees, yet, not one executive faced criminal charges.[19] Instead, Wells Fargo walked away with an agreement to pay a $185 million fine and continued business as usual.[20]

This leads to a major question: what changed?[21] Why are modern day executives walking away with nothing more than a slap on the wrist and a fine?[22]

Wolf, *HSBC to Pay $1.9 Billion U.S. Fine in Money-Laundering Case*, REUTERS (Dec. 11, 2012), https://www.reuters.com/article/us-hsbc-probe/hsbc-to-pay-1-9-billion-u-s-fine-in-money-laundering-case-idUSBRE8BA05M20121211 [https://perma.cc/ZNA8-L6D7] (detailing the deal between HSBC and the United States government). Assistant Attorney General Lanny Breuer defended the non-prosecution agreement (NPA) given to HSBC by explaining that if HSBC were prosecuted, the bank would lose its U.S. banking license and as a result the "collateral consequences" would be dire. *See* Rushe & Treanor, *supra* note 12.

[15] Jesse Singal, *Why It's Unlikely Anyone Will Go to Jail over Wells Fargo's Massive Fraud Scheme*, N.Y. MAG. (Sept. 9, 2016), http://nymag.com/intelligencer/2016/09/why-no-one-will-go-to-jail-over-wells-fargos-fraud-scheme.html [https://perma.cc/Z68W-EVG3].

[16] *See id.* (explaining the Wells Fargo scandal).

[17] Matt Egan, *Wells Fargo Uncovers up to 1.4 Million More Fake Accounts*, CNN MONEY (Aug. 31, 2017), https://money.cnn.com/2017/08/31/investing/wells-fargo-fake-accounts/index.html [https://perma.cc/7S7J-R7B7]. The additional fake bank and credit cards were found in an analysis that the bank conducted. *See id.* (detailing the Wells Fargo scandal). As a result of the Wells Fargo scandal, Independent Directors on the Board of Wells Fargo hired Shearman & Sterling LLP to conduct an internal investigation to discover how the improper sales practices in the Community Banks started and how to fix and prevent this type of misconduct in the future. *See Independent Directors of the Board of Wells Fargo & Company Sales Practices Investigation Report*, WELLS FARGO (Apr. 10, 2017), https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/presentations/2017/board-report.pdf [https://perma.cc/9ET6-S2H5] (reporting on the results of the internal investigation).

[18] *See* Stacy Cowley, *Wells Fargo May Have Found More Fake Accounts Created by Employees*, N.Y. TIMES (Aug. 4, 2017), https://www.nytimes.com/2017/08/04/business/dealbook/wells-fargo-fraud-accounts.html [https://perma.cc/MQ9B-GXDY] (uncovering more of the details behind the Wells Fargo scandal).

[19] *See* Singal, *supra* note 15 (explaining why no Wells Fargo executive will go to jail over the scandal).

[20] *See id.* (detailing the fine that Wells Fargo paid).

[21] *Compare Enron Fast Facts*, *supra* note 1 (describing the consequences Enron executives faced for their misconduct), *with* Keefe, *supra* note 11 (explaining how no HSBC executive was punished for their alleged crimes). After the Enron scandal, twenty-four executives were convicted, yet despite HSBC's alleged facilitation of laundering money, not one executive was prosecuted. *Compare 10 Years Later: What Happened to the Former Employees of Enron?*, *supra* note 2 (detailing how many executives at Enron were convicted), *with* Keefe, *supra* note 11 (describing how no HSBC executive was indicted or convicted). Similarly, only one mid-level executive was convicted as a result of the

Are executives less culpable?[23] Are large corporations less culpable?[24] Or is the culture of waiver preventing the Justice Department from prosecuting white collar corporate crime?[25]

Part I of this Note explores the history of corporate prosecution and the use of attorney-client waivers.[26] It also discusses the waiver of attorney-client privilege and the policy changes within the Justice Department regarding the waiver of attorney-client privilege.[27] Part II analyzes the difficulty of prosecuting corporations, and further looks at judicial oversight over deferred prosecution agreements involving the waiver of attorney-client privilege.[28] Part III argues that Congress should pass a statute barring the corporate waiver of attorney-client privilege to encourage the Justice Department to return to its previous practices of conducting independent investigations of corporate misconduct to preserve the sanctity of attorney-client privilege and deter future corporate crimes.[29]

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financial crisis and trading faulty sub-prime mortgages, whereas in the case of WorldCom, six executives were prosecuted and convicted for their roles in fraudulently covering WorldCom's losses. *See* Zales, *supra* note 8, at 167, 177 (detailing the fates of different executives at different points in time).

[22] *See* Keefe, *supra* note 11. HSBC allegedly laundered money for a drug cartel and a bank associated with terrorists yet not one individual was prosecuted and the company only faced a fine of about $2 billion. *See id.* (noting the alleged crimes HSBC committed).

[23] *See* Peter Henning, *Why It Is Getting Harder to Prosecute Executives for Corporate Misconduct*, CLS BLUE SKY BLOG (June 13, 2017), http://clsbluesky.law.columbia.edu/2017/06/13/why-it-is-getting-harder-to-prosecute-executives-for-corporate-misconduct/ [https://perma.cc/Y5Z7-CV7B] (explaining that the days where high-level executives like Jeff Skilling are prosecuted are over and there is a "responsibility gap" between the top management and day-to-day conduct that violates the law). *See id.* (explaining that the "responsibility gap" is the gap between holding executives accountable for corporate misconduct).

[24] *See* Arthur E. Wilmarth, Jr., *Too Big to Fail, Too Few to Serve? The Potential Risks of Nationwide Banks*, 77 IOWA L. REV. 957, 994 (1992) (detailing the pitfalls of large nationwide banks). As early as the 1990s legal scholars were worried that the "megamergers" in the banking industry were going to create a small number of banks that would be "too big to fail." *See id.* at 960. "Too big to fail" refers to the Federal Deposit Insurance Corporation's ("FDIC") policy of protecting both uninsured and insured deposits in large banks that are failing. *See id.* at 994 (explaining what "too big to fail" is). The FDIC is an independent agency that Congress created to ensure public confidence and stability in the financial system. *See* FED. DEPOSIT INS. CORP., 2018–2022 STRATEGIC PLAN (2018), https://www.fdic.gov/about/strategic/strategic/mission.html [https://perma.cc/WZ6G-CX5M].

[25] *See* Note, *Developments in White Collar Criminal Law and the Culture of Waiver*, 14 BERKELEY J. CRIM. L. 199, 203–04 (2009) (providing an overview of how and why white collar crime has evolved). The culture of waiver is the policy the Justice Department had that was viewed to encourage the disclosure of privileged information. *See id.* at 203 (explaining the culture of waiver).

[26] *See infra* notes 30–128 and accompanying text.

[27] *See infra* notes 30–128 and accompanying text.

[28] *See infra* notes 129–182 and accompanying text.

[29] *See infra* notes 183–220 and accompanying text.

I. The Evolution of White Collar Prosecution, the Increase of Deferred Prosecutions, Waiver of Attorney-Client Privilege, and the Justice Department's Many Memos on Corporate Prosecution

Prosecuting a corporation involves many nuances related to attorney-client privilege, deferred prosecution agreements, and unintended collateral consequences.[30] This Part of the Note has four sections.[31] Section A gives a brief overview of the progression of white collar prosecution.[32] Section B describes the Justice Department's evolving guidance regarding corporate prosecution and how the waiver of attorney-client privilege relates to its policies.[33] Section C explains attorney-client privilege in a corporate setting.[34] Section D details deferred prosecution agreements ("DPAs").[35]

A. The Ebb and Flow of White Collar Prosecution

Criminal corporate liability emerged after a 1909 landmark case, *New York Central and Hudson River Rail Road Company v. United States*, where the Supreme Court found that corporations can be held criminally responsible for their employees' or directors' misdeeds.[36] As a result of this landmark decision, historically after every financial downturn, corporations and their executives were prosecuted for their roles.[37] For instance, in the 1980s, after the "junk bond" collapse and the Saving and Loan Crisis, the government responded by creating a task force to prosecute over eight-hundred bankers—many of them executives.[38] In the 2000s, after the collapse of Enron, over

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[30] *See* Upjohn v. United States, 449 U.S. 383, 389–90 (1981) (discussing the complications in applying attorney-client privilege to a corporation); Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 923 (2006) (detailing the nuances of attorney-client privilege in a corporate setting); David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1311 (2013) (explaining that thousands of employees lost their jobs in the wake of the prosecution of Arthur Andersen); Frieden, *supra* note 4 (explaining that as a result of WorldCom's fraud, WorldCom entered into the "largest bankruptcy in U.S. history").

[31] *See infra* notes 36–128 and accompanying text.

[32] *See infra* notes 36–43 and accompanying text.

[33] *See infra* notes 44–84 and accompanying text.

[34] *See infra* notes 85–105 and accompanying text.

[35] *See infra* notes 106–128 and accompanying text.

[36] *See* N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 489, 499 (1909); Ellen S. Podgor, *100 Years of White Collar Crime in "Twitter,"* 30 REV. LITIG. 535, 536 (2011) (commenting that *N.Y. Central & Hudson River Railroad* is cited as the first case to impose criminal liability).

[37] *See* Keefe, *supra* note 11 (noting that the lack of prosecution after the financial crisis was a departure from the historic pattern of prosecuting the institutions and people responsible for the downturn).

[38] *See* Zales, *supra* note 8, at 177 (noting the lack of prosecutions after the financial crisis); Jed S. Rakoff, *The Financial Crisis: Why Have No High Level Executives Been Prosecuted?*, N.Y. REV. BOOKS

twenty-four individuals were prosecuted.[39] The Justice Department did not stop with Enron—it also indicted Arthur Andersen, Enron's accounting firm, for its role in destroying documents related to Enron's fraud.[40] As a result of Arthur Andersen's indictment, the firm collapsed and twenty-eight thousand employees lost their jobs.[41] Fast forward to today where, in stark contrast, after the financial crisis in 2008, only one mid-level executive was prosecuted.[42] This drastic change in white collar prosecution can be attributed to the differ-

(Jan. 9, 2014), https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/ [https://perma.cc/E2AQ-KCF4] (providing the prosecution histories of executives). Junk bonds are high-yield bonds rated "BB" or lower and issued by companies that carry a large amount of debt or have risky business plans. *See* Christopher Matthews, *Junk Bonds: Wall Street's Newest Bubble?*, TIME (Aug. 20, 2010), http://business.time.com/2012/08/20/junk-bonds-wall-streets-newest-bubble/ [https://perma.cc/V33R-DZT3] (describing what junk bonds are). These loans have a higher yield (normally 3–4% interest more) than U.S. government bonds because of their riskiness. *See id.* The junk bond bubble was perpetrated by Michel Milken and his firm, Drexel Brunham Lambert. *See* William D. Cohan, *Michel Milken Invented the Modern Junk Bond, Went to Prison, and Then Became One of the Most Respected People on Wall Street*, BUS. INSIDER (May 2, 2017), https://www.businessinsider.com/michael-milken-life-story-2017-5 [https://perma.cc/T3YE-S8VW] (explaining who Michael Milken was). Milken recognized that high-yield bonds (junk bonds) were more profitable than traditional bonds and with his firm created a new supply of junk bonds by encouraging companies who could not get traditional bonds to issue bonds underwritten by Drexel Brunham. *See id.* (detailing why junk bonds became so popular). The Savings and Loan Crisis occurred from 1980–1989. *See* Kenneth J. Robinson, *Savings and Loan Crisis: In the 1980s, the Financial Sector Suffered Through a Period of Distress That Was Focused on the Nation's Saving and Loan Industry*, FED. RESERVE HISTORY (Nov. 22, 2013), https://www.federalreservehistory.org/essays/savings_and_loan_crisis [https://perma.cc/V5NA-4Q2M] (describing what the savings and loan crisis was). Savings and Loan institutions ("S&Ls") were created in 1932 and paid lower interest rates in return for lower mortgage rates that promoted home ownership. *See The S&L Crisis; A Chrono-Bibliography*, FED. DEPOSIT INS. CORP., https://www.fdic.gov/bank/historical/sandl/ [https://perma.cc/QC74-APGK] (explaining how S&Ls functioned). As a result, S&Ls were affected by increased interest rates, especially during the 1970s when the economy became more stagnant, and under the Garn-St. Germaine Act, S&Ls were permitted to make riskier loans and investments such as junk bonds in order to become more profitable. *See* Peter Cohan, *Today's Financial Meltdown vs. the 1990s S&L Crisis: Which Was Worse?*, AOL (July 3, 2010), https://www.aol.com/2010/07/03/financial-meltdown-vs-savings-loan-crisis-recession/ [https://perma.cc/R9JP-VZK4] (explaining the fallout from the S&L crisis). When the junk bond market collapsed, the United States had to give the S&L industry a $220 billion bailout. *See id.*

[39] *See 10 Years Later: What Happened to the Former Employees of Enron?*, *supra* note 2 (explaining that the Enron scandal resulted from the corporation deceiving investors about its true profits). As a result, the company filed for bankruptcy and over twenty-one thousand employees lost their jobs. *See Enron Scandal at-a-Glance*, BBC NEWS WORLD ED. (Aug. 22, 2002), http://news.bbc.co.uk/2/hi/business/1780075.stm [https://perma.cc/42KA-VD9F] (detailing the Enron scandal).

[40] *See* Paul J. Larkin, Jr. & John-Michael Seibler, *All Stick and No Carrot: The Yates Memorandum and Corporate Criminal Liability*, 46 STETSON L. REV. 7, 17 (2016) (explaining Arthur Andersen's role in destroying documents in the wake of the Enron scandal).

[41] *See id.* (noting that despite overturning its conviction, Arthur Andersen ceased to exist and its employees, even the ones not working on Enron, subsequently lost their jobs).

[42] *See* Eisinger, *supra* note 10 (commenting that only one mid-level executive was prosecuted as a result of the financial crisis).

ent policies and guidelines that the Justice Department created for its U.S. attorneys and their reliance on deferred prosecution agreements ("DPAs").[43]

B. The Justice Department's Many Memos Instructing Prosecutors How to Prosecute Corporations

Before former Deputy Attorney General Eric Holder issued his infamous memorandum known as the "Holder Memo," federal corporate prosecutions were guided by the Justice Manual.[44] As the prosecution of corporations became more prevalent in the 1990s, Deputy Holder sought to provide federal prosecutors additional guidance on the matter.[45] In his memorandum, Deputy Holder stressed that corporations should be treated the same as individuals and emphasized the numerous benefits of prosecuting corporations, such as being "a force for positive change of corporate culture."[46] One such benefit Deputy Holder expounded was the ability to alter corporate behavior through prosecution of corporate misconduct.[47] The Holder Memo also contained a list of factors to be considered when prosecuting a corporation, such as the nature and seriousness of the offenses, the pervasiveness of wrongdoing within the corporation, the collateral consequences that would result from prosecution, and the corporation's cooperation with the Justice Department.[48] Of particular interest,

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[43] *See generally* Memorandum from Eric Holder, Deputy Att'y Gen., U.S. Dep't of Justice, to All Component Heads & U.S. Att'ys (June 16, 1999), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF [https://perma.cc/K4MP-LVPW] [hereinafter Holder Memo] (promulgating the U.S. Attorney guidelines under Deputy Holder). A deferred prosecution agreement ("DPA") is an agreement where the prosecutor charges a party but agrees to defer prosecution of the charges and potentially to dismiss the charges if certain conditions are met. *See* Uhlmann, *supra* note 30, at 1304 (explaining what a DPA is).

[44] *See Developments in White Collar Criminal Law and the Culture of Waiver*, 14 BERKELEY J. CRIM. L. 199, 204–05 (2009) (explaining the source of guidance that U.S. Attorney's received prior to the Holder Memo regarding how to prosecute). *See generally* U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-28.1100 (2018) [hereinafter 2018 JUSTICE MANUAL] (providing guidance on how to prosecute). The Justice Manual instructed prosecutors to consider a corporation's cooperation when deciding whether to prosecute. *See id.* § 9-28.300 (listing the factors for a prosecutor to consider when deciding whether to prosecute a corporation). Prior to 2018, the Justice Manual was entitled the U.S. Attorney's Manual, but this Note will refer to it as the Justice Manual, as it is now called. *See id.*

[45] *See* Holder Memo, *supra* note 43 (commenting that federal prosecutors are faced with the criminal conduct of corporations more frequently); Uhlmann, *supra* note 30, at 1309 (noting that as corporate crime became an increased focus of prosecution within the Justice Department, Deputy Holder circulated a memorandum advising U.S. Attorneys on how to prosecute corporations).

[46] *See* Holder Memo, *supra* note 43, § I (explaining that corporations should be treated the same as individuals, not more leniently and not more severely); Uhlmann, *supra* note 30, at 1309 (summarizing the Holder Memo).

[47] *See* Holder Memo, *supra* note 43, § I (detailing the benefits of prosecuting corporations).

[48] *See id.* (listing factors to consider when prosecuting a corporation). Collateral consequences of prosecuting a corporation included the harm that would occur to employees who were not personally culpable and the unfair harm that could befall shareholders. *See id.* (including collateral consequences as a factor for a U.S. Attorney to consider in prosecuting a corporation).

the Holder Memo listed the waiver of attorney-client privilege as evidence of a corporation's cooperation.[49] The memorandum explicitly stated that such waivers demonstrate a corporation's willingness to cooperate and enable the government to obtain the statements of employees, who in these instances are often potential witnesses or targets.[50]

Under the Holder Memo's guidance, DPAs and non-prosecution agreements ("NPAs") were used sparsely prior to 2001, but after the prosecution and collapse of Enron and Arthur Andersen, the use of DPAs increased drastically.[51] To prevent future devastating business collapses related to the prosecution of corporate crimes, the Justice Department once again revised its guidance regarding prosecuting corporations.[52] Specifically, in 2003, Deputy Attorney General Larry Thompson circulated a new memorandum, the Thompson Memo, that fortified the use of DPAs and NPAs as opposed to costly criminal trials.[53] The Thompson Memo is particularly notable because it contradicts the Justice

[49] *See id.* §§ II.A.4, VI (providing examples of cooperation). The Holder Memo also listed disclosing the results of a company's internal investigation, the corporation's willingness to identify the individuals responsible for the conduct and a corporation's willingness to make witnesses available as factors of cooperation. *See id.* (detailing what is considered cooperation by a corporation). These gauges of a corporation's cooperation were meant to help overcome the obstacles a prosecutor would face when prosecuting a corporation. *See id.* § VI (noting the obstacles prosecutors face in prosecuting corporations).

[50] *See id.* § VI.B (explaining why the waiver of attorney-client privilege helped the government); *see also* Uhlmann, *supra* note 30, at 1312 (noting the Holder Memo instructed federal prosecutors to seek attorney-client privilege waivers as a condition of being considered cooperative). *But see* Bloomberg News, *supra* note 5 (explaining that four ex-WorldCom executives cooperated with prosecutors against WorldCom's ex-CEO and detailing the sentencing of WorldCom's former controller); Murphy & Barrionuevo, *supra* note 3 (commenting that Enron's ex-CFO helped the government prosecute the CEO for a plea deal and not a DPA).

[51] *See* Uhlmann, *supra* note 30, at 1308 (explaining the history of corporate waivers of attorney-client privilege). From 1992–2001 the Justice Department only entered into thirteen DPAs and NPAs. *See id.* (detailing a more in-depth history of waivers of attorney-client privilege). From 2001–2014 there were hundreds of DPAs and NPAs entered into by federal prosecutors. Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1802 (2015). The Justice Department was criticized heavily after the collapse of Arthur Andersen with claims that the prosecution was the equivalent of the death penalty to the firm. *See* Uhlmann, *supra* note 30, at 1311 (explaining the backlash of prosecuting corporations). The Justice Department defended its prosecution of Arthur Andersen due to the massive losses that Arthur Andersen fraudulently concealed for Enron and the fact that the firm obstructed justice by destroying documents. *See id.* at 1310 (for the Justice Department's justification for prosecuting Anderson).

[52] *See* Uhlmann, *supra* note 30, at 1311 (explaining that prior to the Memorandum from Larry Thompson in 2003, there was not guidance regarding the possibility of offering a corporation pretrial diversion). *See generally* Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to U.S. Att'ys (Jan. 20, 2003) [hereinafter Thompson Memo] (providing U.S. Attorneys with a manual regarding how they should prosecute corporations).

[53] *See* Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 322 (2007) (for a summary of why U.S. Attorneys used DPAs and NPAs). Criminal trials were both economically costly and costly because of the collateral consequences that could result, such as the bankruptcy of a company. *See* Uhlmann, *supra* note 30, at 1303, 1310–11 (explaining a criminal indictment was the equivalent to a death penalty for a corporation).

Manual's express preference for plea agreements rather than NPAs.[54] The Justice Manual makes it clear that NPAs and DPAs should only be used when there is no other means to encourage corporate cooperation—they were not meant as an everyday tool to avoid a costly or difficult trial.[55] Unlike DPAs for individuals, however, DPAs for corporations were typically only granted when the corporation was viewed as cooperative by waiving its attorney-client privilege.[56]

In 2015, Sally Yates, the then Deputy Attorney General, once again modified the Justice Department's guidelines relating to the prosecution of corporations.[57] Of particular interest in the Yates Memo was its emphasis on "all or nothing" cooperation from corporations.[58] Prior to this new guidance in the

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[54] *See* 2018 JUSTICE MANUAL, *supra* note 44, § 9-27.600.2 (dictating that plea deals are preferable to DPAs); Christopher Modlish, Note, *The Yates Memo: DOJ Public Relations Move or Meaningful Reform That Will End Impunity for Corporate Criminals?*, 58 B.C. L. REV. 743, 758 (2017) (explaining how the Thompson Memo is unique). A DPA occurs when the government files charges but makes a deal with the defendant to dismiss the charges after a certain amount of time if the defendant follows the terms of the agreement. *See* United States. v. Fokker Servs. B.V., 818 F.3d 733, 738–39 (D.C. Cir. 2016) (describing how a DPA functions). The Justice Manual goes on to emphasize that even where a DPA is appropriate, a balancing test weighing the public's interest should be conducted. *See* 2018 JUSTICE MANUAL, *supra* note 44, § 9-27.620 (instructing the attorney for the government to weigh all relevant considerations such as, the importance of the investigation, the value of the person's cooperation to the investigation, the person's culpability, and the interests of any victims when weighing the public's interest in offering a NPA); Modlish, *supra*, at 758 (describing the U.S. Attorney's Manual). An NPA is an agreement that the Justice Department makes directly with the corporation or defendant not to prosecute them unless the defendant breaches the terms of the contract. *See* Modlish, *supra*, at 759 (detailing what an NPA is).

[55] *See* 2018 JUSTICE MANUAL, *supra* note 44, § 9-27.600; *see also* Modlish, *supra* note 54, at 758 (commenting that the U.S. Attorney's manual has an express preference for preventing a defendant from escaping liability for his or her conduct and an alternative to a non-prosecution agreement should be considered first). Originally, DPAs and NPAs were used for first-time offenders but they have been increasingly used against corporations. *See* Uhlmann, *supra* note 30, at 1303 (detailing how deferred prosecution and non-prosecution agreements were used for a wide variety of reasons such as preserving both prosecutorial and judicial resources and avoiding the unreasonable effects on first-time offenders). *See* 2018 JUSTICE MANUAL, *supra* note 44, § 9-27.620 (instructing the attorney for the government to weigh all relevant considerations such as, the importance of the investigation, the value of the person's cooperation to the investigation, the person's culpability, and the interests of any victims when weighing the public's interest in offering a NPA); Modlish, *supra* note 54, at 758 (describing the Justice Manual).

[56] *See* Uhlmann, *supra* note 30, at 1304 (explaining the requirements for individuals who enter into a DPA). In the Thompson Memo, one of the factors of determining if a corporation is deemed cooperative is if it waived its attorney-client privilege. *See* Thompson Memo, *supra* note 52, at 6 (for the full list of factors).

[57] *See* Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, to Assistant Att'y Gen., Antitrust Div., et al. 5 (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download [https://perma.cc/GNZ2-HPQW] [hereinafter Yates Memo]. *See generally* Yi An Pan, Note, *The Yates Memo: Watch Out, the DOJ Is Coming—Or Is It?*, 69 RUTGERS U. L. REV. 791 (2017) (describing the details of the Yates Memo).

[58] *See* Pan, *supra* note 57, at 804 (detailing the "all or nothing" provision in the Yates Memo); Katrice Bridges Copeland, *The Yates Memo: Looking for "Individual Accountability" in All the Wrong Places*, 102 IOWA L. REV. 1897, 1900 (2017).

Yates Memo, corporations could get cooperation credit without disclosing the particular individuals responsible for the misconduct.[59] Now, in order for a corporation to receive cooperation credit under the Yates Memo, it needed to disclose all facts related to the individuals responsible or involved in the corporate misconduct.[60] Under the Thompson Memo and prior to the Yates Memo, corporations could get cooperation credit without disclosing the particular individuals responsible for the misconduct.[61] These large corporations could simply feign ignorance when it came to what individuals caused the investigation and still receive cooperation credit.[62] The Yates Memo clarified that this conduct would no longer be acceptable and companies must now investigate the misconduct and determine which individual(s) were responsible for it, with particular focus on the executives.[63] This reliance upon a corporation to investigate misconduct or wrongdoing within its own organization is not necessarily new, but the Yates Memo's focus on finding the individual(s) responsible is.[64] Although the Yates Memo allows corporations themselves to enjoy the benefits of DPAs, it specifically expresses that a prosecutor should not agree to any resolution that dismisses charges or provides immunity for individual officers and employees.[65]

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[59] *See* Copeland, *supra* note 58, at 1907 (explaining that under the Yates Memo, corporations now had to turn over the individuals responsible for the misconduct in order to receive a DPA or NPA); Pan, *supra* note 57, at 804 (commenting that prior to the Yates Memo corporations could get cooperation credit without turning over a culpable individual).

[60] *See* Copeland, *supra* note 58, at 1900 (noting the new Yates Memo rules for corporations receiving cooperation credit).

[61] *See* Pan, *supra* note 57, at 804 (noting under the Yates Memo corporations could no longer pretend to be ignorant about the culpable individuals if they wanted to receive cooperation credit).

[62] *See id.* (explaining how corporations could receive cooperation credit without implicating any specific employee).

[63] *See* Yates Memo, *supra* note 57, at 5 (instructing that "absent extraordinary circumstances . . . [d]epartment lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees"); Modlish, *supra* note 54, at 764 (describing the focus of the Yates Memo).

[64] *See* Copeland, *supra* note 58, at 1902 (explaining the significance of the Yates Memo's focus on individuals responsible for misconduct); Pan, *supra* note 57, at 804 (noting the focus on turning over individuals); *see also* Rakoff, *supra* note 38 (commenting on the common practice of the corporation's counsel to ask the Justice Department to defer its investigation until the corporation has conducted its own investigation). The internal investigation is then turned over in exchange for a DPA without the Justice Department doing its own investigation and everyone goes home feeling like it is a win. *See id.* (describing what giving a DPA to a corporation looks like); *see also* Copeland, *supra* note 58, at 1901–02 (commenting that the Justice Department relies heavily on corporations sharing the results of their internal investigations).

[65] *See* Yates Memo, *supra* note 57, at 5 (instructing U.S. attorneys that absent extraordinary circumstances, prosecutors should not agree to a resolution that requires the dismissal of charges against individual employees or officers). The Yates Memo also provides that prosecutors cannot release any individual from criminal (or civil) liability without getting it approved by the Assistant Attorney General or United States Attorney. *See id.* (detailing the new rules for prosecutors).

Many perceived the Yates Memo's newfound focus on the individual as another attempt by the Justice Department to force corporations to waive their attorney-client privilege.[66] The Yates Memo leveraged cooperation credit in exchange for previously protected internal investigation information.[67] Despite this, the Justice Department maintained that there was no pressure to waive attorney-client privilege because the language in the Yates Memo states that prosecutors should be proactive in their investigations before, during, and after to determine if a corporation should receive any cooperation credit.[68] Yet, the Yates Memo explicitly states that "all relevant facts" must be disclosed to the Justice Department to receive any cooperation credit for a DPA, NPA, or plea deal.[69] This requirement that "all relevant facts" must be disclosed to receive cooperation credit likely results in a corporation disclosing privileged material.[70]

In the wake of the Yates Memo, companies under investigation seeking a NPA or DPA, in order to avoid a fate like Enron, began providing the Justice Department with information regarding the individuals responsible for the company's misconduct.[71] For instance, in a NPA with GNC Holdings, Inc., the NPA stated that the agreement was due in part to GNC's "cooperation in this matter, including its providing of the Government with information about the conduct of individuals within and outside of GNC."[72] In a DPA between the

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[66] *See* Copeland, *supra* note 58, at 1907 (explaining that the Yates Memo's focus on a corporation turning over "all relevant facts" regarding culpable individuals necessitates that information protected by attorney-client privilege must be turned over).

[67] *See id.* (concluding that the Yates Memo is another example of the Justice Department holding the threat of prosecution over a corporation in order to acquire a corporation's internal investigation results and have the corporation waive attorney-client privilege).

[68] *See id.* (explaining that the Yates Memo encourages prosecutors to investigate individuals at every step of the process); Yates Memo, *supra* note 57, at 4 (instructing prosecutors to be active in investigating corporate misconduct). Critics maintain that despite the Justice Department's assertion that the "culture of waiver" does not exist, it does. *See* Copeland, *supra* note 58, at 1908 (explaining the "culture of waiver" at the Justice Department).

[69] *See* Yates Memo, *supra* note 57, at 2 (instructing prosecutors that if a corporation wants any cooperation credit it must turn over "all relevant facts" regarding the individuals that are culpable); Copeland, *supra* note 58, at 1907 (explaining the nuances of the Yates Memo).

[70] *See* Copeland, *supra* note 58, at 1908 (noting that the Yates Memo attacked attorney-client privilege and pit employers against their own employees). Corporations were expected to give up their culpable employees rather than face indictment. *See id.* at 1909 (describing the corporation's obligations under the Yates Memo). Furthermore, unless there is an *Upjohn* warning given by the corporation's counsel, many employees do not realize that the corporation can waive attorney-client privilege and what they reveal to corporate counsel can be used against them. *See id.* (detailing the potential consequences of the Yates Memo). An *Upjohn* warning is a statement made by the corporation's counsel informing the corporation's employee that the attorney represents the corporation and not the employee. *See* Ivonne Mena King & Nicholas A. Fromherz, *Getting the* Upjohn *Warning Right in Internal Investigations*, 17 PRAC. LITIGATOR 59, 60 (2006).

[71] *See infra* notes 72–75 and accompanying text.

[72] *See* Non-Prosecution Agreement, United States v. GNC Holdings, Inc. (N.D.Tex. Dec. 7, 2016), http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/GNC.pdf [https://perma.cc/H7CS-DPXH] (explaining that GNC allegedly violated the Federal Food, Drug, and Cos-

Justice Department and PLAZA, a construction group, the Justice Department cited that a DPA was appropriate as a result of PLAZA's cooperation.[73] Specifically PLAZA agreed to disclose all relevant information in its possession, including information about PLAZA's employees and officers.[74] Notably missing from the DPA was any mention of attorney-client privilege with respect to the documents about PLAZA's activities and employees that it disclosed to the Justice Department.[75]

On paper, the Justice Department's policy regarding cooperation has remained stagnant under the current administration.[76] Former Deputy Attorney General Rod Rosenstein recently articulated that any modifications to the Yates Memo would focus on the Justice Department's "resolve to hold individuals accountable for corporate wrongdoing."[77] Although he maintained that any changes made to the Yates Memo would be clarifying policy, he noted that he agreed with the Yates Memo that prosecutors should be wary of closing investigations without first going after any of the individuals responsible for the

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metic Act ("FDCA") and distributed products with false information about the ingredients). GNC is a global specialty health and wellness retailer. *See Company Overview*, GNC, https://www.gnc.com/company-overview.html [https://perma.cc/4KX3-RKTL]. GNC sells performance supplements, vitamins, herbs and greens, health and beauty products as well as food. *See id.* (reflecting a description of GNC's business).

[73] *See* Deferred Prosecution Agreement at 17, United States v. PLAZA Constr. LLC, No. 1:16-cr-00532 (E.D.N.Y. Oct. 14, 2016), http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/plaza-construction.pdf [https://perma.cc/E8XQ-DVED] (explaining a DPA was appropriate because of PLAZA's cooperation). PLAZA allegedly conspired to commit mail fraud and wire fraud by adding fees to clients' construction bills that were not actually incurred. *See id.* at 9–10 (explaining PLAZA's alleged illegal conduct). PLAZA is a construction management and general contracting firm. *See Who We Are*, PLAZA CONSTRUCTION, https://www.plazaconstruction.com/profile/profile/ [https://perma.cc/36U6-RPMV] (providing background information on PLAZA).

[74] *See* Deferred Prosecution Agreement, *supra* note 73, at 6 (explaining PLAZA's prior and ongoing cooperation was a material factor in the Justice Department agreeing to a DPA). PLAZA was additionally required to take remedial actions as part of the DPA that included establishing a general counsel position, creating a Compliance Department, developing a Compliance Committee, holding an annual training for all non-union employees and officers on ethics and relevant laws to construction projects, creating an ethics hotline for employees to report ethics violations, ensuring that PLAZA does not bill its clients for more than the contracts permit, and revamping its time sheet and billing policies. *See id.* (detailing the agreement between PLAZA and the prosecutors).

[75] *See generally id.* (finding no mention of attorney-client privilege in the DPA).

[76] *See generally* Rod J. Rosenstein, Deputy Att'y Gen., U.S. Dep't of Justice, Keynote Address at the New York University School of Law Program on Corporate Compliance and Enforcement (Oct. 6, 2017), *in* COMPLIANCE & ENF'T, https://wp.nyu.edu/compliance_enforcement/2017/10/06/nyu-program-on-corporate-compliance-enforcement-keynote-address-october-6-2017/ [https://perma.cc/7RC8-T5CP] (explaining that when the Justice Department issues new policies regarding prosecution it will be an update to the U.S. Attorney's Manual rather than a memo).

[77] *See id.* (Deputy Rosenstein agreed with Sally Yates that prosecutors should be careful about settling corporate prosecutions without going after the individuals responsible for the conduct).

corporation's misconduct.[78] Remarkably missing from the Deputy's speech was any mention of attorney-client privilege or the waiver thereof.[79]

In reality, DPAs under the current administration of the Justice Department include language protecting attorney-client privilege but the cooperation credit remains tied to providing evidence of individual misconduct.[80] For instance, in a recent 2017 DPA entered into by SBM Offshore and the Justice Department, the agreement states that, going forward, the company will disclose all information not protected under attorney-client privilege.[81] Yet, in the section describing why the DPA was appropriate, the agreement states that SBM received full credit for its cooperation with the investigation, including conducting a complete internal investigation and making presentations regarding this investigation to the U.S. Attorneys.[82] Furthermore, SBM provided "all relevant facts" to the Justice Department, assisting their prosecution of the culpable individuals.[83] The initial language regarding protecting attorney-client privilege seems to conflict with providing the Justice Department with "all relevant facts" and briefing the Justice Department regarding the results of

[78] *See id.* (describing Deputy Rosenstein's speech regarding corporate prosecution).

[79] *See generally id.* (reflecting the speech by Deputy Rosenstein regarding the Justice Department's policies). NPAs under the Sessions-led Justice Department also mention a corporation's cooperation. *See* Non-Prosecution Agreement, United States v. RBS Secs. Inc. (D.Conn. Oct. 25, 2017) https://www.justice.gov/file/1006796/download [https://perma.cc/7JVY-6WA6] (noting that the U.S. Attorney's Office will not criminally prosecute RBS in part because of RBS's extensive cooperation); Non-Prosecution Agreement, United States v. Prime Partners SA (S.D.N.Y. Aug. 14, 2017), https://www.justice.gov/usao-sdny/press-release/file/989741/download [https://perma.cc/VF7P-ETCL] (citing the corporation's "extraordinary cooperation with the office").

[80] *See* Deferred Prosecution Agreement, United States v. SBM Offshore, N.V., No. 17-cr-00686 (S.D.Tex. Nov. 29, 2017), http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/sbm-offshore-dpa.pdf [https://perma.cc/X44A-ZFU7] (mentioning attorney-client privilege).

[81] *See id.* (detailing what the DPA between SBM and the Justice Department contained). SBM Offshore was alleged to have partaken in a bribery scheme in Brazil, Equatorial Guinea, Angola, Iraq, and Kazakhstan from 1996 to 2012. *See* Press Release, U.S. Dep't of Justice, SBM Offshore N.V. and the United States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries (Nov. 29, 2017), https://www.justice.gov/opa/pr/sbm-offshore-nv-and-united-states-based-subsidiary-resolve-foreign-corrupt-practices-act-case [https://perma.cc/8YXH-CLFS] (describing the crimes SBM allegedly committed). The DPA did not include any protection for individuals and in fact two executives with the company were prosecuted by the Justice Department and took a plea deal. *See id.* (explaining the DPA). SBM Offshore designs, installs, supplies, and operates floating production systems for the offshore energy industry. *See Company Profile*, SBM OFFSHORE, https://www.sbmoffshore.com/who-we-are/company-profile/ [https://perma.cc/VXA6-R7NF] (for a background on SBM's business).

[82] *See* Deferred Prosecution Agreement, *supra* note 80 (providing details of the SBM DPA).

[83] *See id.* (explaining that the DPA was appropriate because SBM provided "all relevant facts" to the Justice Department including those about the individuals responsible for the misconduct). The "all relevant facts" language is the same as the Yates Memo. *See* Yates Memo, *supra* note 57, at 5 (instructing prosecutors to only consider deals if "all relevant facts" are turned over).

SBM's internal investigation, all information that would likely be protected by attorney-conflict privilege.[84]

C. Deferred Prosecution Agreements—the Federal Prosecutors' Sweetheart

DPAs have long been tools used within the U.S. Attorneys' Office as a means of pretrial diversion, but until recently they were primarily used for juveniles, first-time offenders, and drug offenders.[85] Now, DPAs are increasingly used in the prosecution of corporations.[86] A DPA is an agreement where the prosecutor charges a party but agrees to defer prosecution of the charges and potentially to dismiss the charges if certain conditions are met.[87] When a DPA is used, the prosecutor still must formally initiate prosecution.[88] In exchange for the deferral of charges, the defendant is usually required to recognize and admit responsibility for the misconduct, agree to terms of rehabilitation, and pay restitution to any victims.[89] If at the end of the "deferral" period, the prosecutor finds the defendant met the conditions of the DPA, the charges are dismissed.[90] If the prosecutor finds the defendant has breached the agreement during the deferral period, charges may be brought and the prosecutor can use any

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[84] *See* Deferred Prosecution Agreement, *supra* note 80 (explaining that the DPA was appropriate because SBM provided "all relevant facts" to the Justice Department including those about the individuals responsible for the misconduct). As a result of the investigation, the Justice Department prosecuted two executives, which resulted in two separate plea deals. *See* Press Release, *supra* note 81 (detailing the results of the internal investigation into SBM).

[85] *See* Allen R. Brooks, *A Corporate Catch-22: How Deferred and Non-Prosecution Agreements Impede the Full Development of the Foreign Corrupt Practices Act*, 7 J.L. ECON. & POL'Y 137, 147 (2010) (commenting that DPAs were an alternative for juveniles and first-time offenders who would face stigma if convicted criminally); Uhlmann, *supra* note 30, at 1303 (detailing that deferred prosecution and non-prosecution agreements were used for a wide variety of reasons such as conserving prosecutorial and judicial resources and avoiding the severe effects on first-time offenders).

[86] *See* Uhlmann, *supra* note 30, at 1312. After the collapse of Arthur Andersen, the Justice Department used DPAs much more frequently with corporations to avoid collateral consequences. *See id.* (providing examples of what the collateral consequences of prosecuting corporations are).

[87] *See id.* at 1304 (describing a DPA).

[88] *See Fokker*, 818 F.3d at 738–39 (explaining under a DPA, the prosecution initiates charges but agrees to dismiss them if the defendant follows the conditions of the agreement). Once charges are initiated against a defendant the parties must go before the court to obtain a waiver from the Speedy Trial Act's requirement that a criminal trial begin within seventy days from when the defendant is charged or makes an initial appearance. *See* United States v. HSBC Bank USA, N.A., 863 F.3d 125, 130 (2d Cir. 2017) (detailing the Speedy Trial Act requirements). The parties must obtain this waiver or the charges will be dismissed. *See id.*; *see also* 18 U.S.C. § 3162(a)(2) (2012) (dictating the rules behind a speedy trial).

[89] *See Fokker*, 818 F.3d at 738–39 (explaining what a defendant generally concedes in order to get a more lenient deal); Uhlmann, *supra* note 30, at 1304 (noting that the defendant usually must admit guilt to get a DPA).

[90] *See* Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1864 (2005) (describing the dynamic between prosecutors and the judiciary).

self-incriminating evidence and admissions obtained during the DPA.[91] Therefore, once an individual or corporation enters into a DPA, it is a commitment to future cooperation as any admissions can be used against them if they fail to comply with the terms of the DPA.[92] DPAs are viewed as a halfway point between a plea agreement and the declination of prosecution.[93]

Corporate prosecution has long involved aspects of voluntary self-regulation and cooperation with the government.[94] The reality is, the government does not have the resources to prosecute every corporation allegedly involved in misconduct.[95] As a result of this economic constraint, federal prosecutors rely heavily on DPAs and NPAs to incite corporations to cooperate fully.[96] Corporations are motivated to cooperate with the government in exchange for a DPA, NPA, or more lenient sentencing so that they may avoid the disastrous fates like those of Enron, WorldCom, or Arthur Andersen.[97]

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[91] *Fokker*, 818 F.3d at 738. One of the benefits of a DPA is that during the deferral period, the government can attach various conditions to the DPA and monitor the defendant's actions. *See* United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 13 (D.D.C. 2015) (providing a reason why a prosecutor would agree to a DPA).

[92] *See* Griffin, *supra* note 53, at 322 (explaining that when a corporation enters into a DPA it is a commitment to cooperate because the corporation likely will have had to take full responsibility for any corporate misconduct that makes it difficult to defend against a future indictment). The Justice Manual states that a DPA can be appropriate for corporations because it acts to repair the corporation's integrity while maintaining the government's ability to prosecute a corporation if it fails to live up to the DPA agreement. *See* Uhlmann, *supra* note 30, at 1314 (detailing why DPAs were originally used).

[93] *See* Griffin, *supra* note 53, at 321 (explaining DPAs are viewed as a middle ground between deciding not to prosecute and an outright guilty plea). Deferred prosecutions are seen by some as a type of probation because the government is agreeing not to prosecute if certain conditions are adhered to by the defendant. *See id.* Alternatives to a DPA would be non-prosecution, a trial, or a plea deal. *See Saena Tech Corp.*, 140 F. Supp. 3d at 13 (noting the reason behind DPAs).

[94] *See* Griffin, *supra* note 53, at 316 (detailing the history of corporate prosecution).

[95] *See* Brown, *supra* note 30, at 902 (explaining attorney-client privilege); Sarah Helene Duggin, *The McNulty Memorandum, the KPMG Decision and Corporate Cooperation: Individual Rights and Legal Ethics*, 21 GEO. J. LEGAL ETHICS 341, 345 (2008) (noting prosecutors justify corporations' cooperation as a means of leveraging the government's resources and holding powerful corporations responsible for their misdeeds); Griffin, *supra* note 30, at 340.

[96] *See* Brooks, *supra* note 85, at 149–50 (noting that the Justice Department realized how useful DPAs and NPAs were in prosecuting corporations as evidenced by the Holder Memo, which did not require prosecutors to follow the standard guidelines for using NPAs and DPAs when they were prosecuting a corporation).

[97] *See* Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613, 1664 (2007) (noting how firms argue that an indictment is the death penalty for a business and therefore forces a company to accept liability and settle before they are even formally charged); Griffin *supra* note 53, at 317–18 (commenting that the sentencing guidelines provided "carrots" to encourage corporations to cooperate and "sticks" to punish uncooperative corporations). DPAs are different from NPAs because under a DPA, charges are formally filed with the court whereas under an NPA there is an agreement between the Justice Department and the corporation with no judicial oversight. *See Fokker*, 818 F.3d at 738 (noting that NPAs are different from DPAs because no formal charges are filed and the agreement is overseen by the parties instead of the court). *See* Uhlmann, *supra* note 30, at 1311 (explaining that thousands of employees lost their jobs in the wake of the prosecution of Ar-

Today, DPAs are being used with vigor—for example, HSBC recently entered into a DPA.[98] According to a Senate report, HSBC helped both a Saudi bank connected with terrorism and Mexico's Sinaloa cartel launder money into the United States.[99] Instead of fighting against a charge of money laundering, HSBC agreed to a DPA and paid a fine of almost two billion dollars.[100] This is just one of the four hundred plus DPAs that the Justice Department used for corporations from 2002–2016.[101] Although some officials in the Justice Department wanted to prosecute HSBC and its executives, the fear of collateral consequences much like those in the wake of Enron or Arthur Andersen prevailed.[102] Unlike a trial, where a guilty verdict is not guaranteed, a deferred prosecution agreement

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thur Andersen); *see also* Rushe & Treanor, *supra* note 12 (explaining how U.S. officials defended the decision not to prosecute HSBC for its role in laundering drug cartel money on the idea that the collateral consequences would be devastating to the U.S. economy). Arthur Andersen was a large accounting firm before it was prosecuted for its role in the Enron scandal and ultimately had to file for bankruptcy. *See* Alexander A. Zendeh, Note, *Can Congress Authorize Judicial Review of Deferred Prosecution and Nonprosecution Agreements? And Does It Need To?*, 95 TEX. L. REV. 1451, 1456 (2017) (noting Arthur Andersen went bankrupt and ceased to exist after the government indicted it). The Justice Manual sanctions DPAs when the collateral consequences of prosecuting and convicting a corporation would be significant to third parties that are innocent. *See* 2018 JUSTICE MANUAL, *supra* note 44, § 9-28.1100 (2015) (providing the guidelines to U.S. Attorneys). The Justice Manual goes on to explain that a DPA or NPA would be appropriate because it would not result in harm to innocent third parties that were removed from the corporation's misconduct and it is a way to reestablish integrity in the corporation. *See id.* (noting why a DPA or NPA would be an acceptable deal).

[98] *See* Keefe, *supra* note 11 (providing details regarding the HSBC DPA).

[99] *See id.* (detailing the alleged criminal actions of HSBC). It was estimated that HSBC helped Mexican drug cartels launder at least $881 billion through HSBC bank accounts. *See* Rushe & Treanor, *supra* note 12. Mexican drug cartels would deposit hundreds of thousands of dollars into HSBC accounts daily. *See id.* (describing the drug laundering by Mexican drug cartels).

[100] See Rushe & Treanor, *supra* note 12 (noting that the fine the company was assessed was equivalent to four weeks of profit for the bank).

[101] *See* Keefe, *supra* note 11 (explaining how many DPAs and NPAs were entered into by the Justice Department).

[102] *See id.* (explaining that Britain's Chancellor of the Exchequer warned U.S. authorities that the prosecution of HSBC might lead to severe implications for the financial market). The DPA with HSBC was a five-year agreement that required HSBC to install independent monitors to change the bank's current internal controls. *See* Rushe & Treanor, *supra* note 12 (providing the details of the DPA with HSBC). When Enron collapsed and subsequently filed for bankruptcy, thousands of employees lost their jobs and $60 billion of market value was wiped out. *See 10 Years Later: What Happened to the Former Employees of Enron?*, *supra* note 2 (explaining the consequences of Enron's collapse). The $60 billion in market value loss was a massive collateral consequence to the shareholders of Enron. *See id.* One employee who worked at Enron as a plant manager for thirty years lost his entire retirement savings worth $1.3 million as a result of the Enron scandal. *See id.* As a result of indicting Arthur Andersen for its role in covering up Enron's massive losses, the collateral consequences included 28,000 employees of Arthur Andersen losing their jobs and the subsequent bankruptcy. *See* Uhlmann, *supra* note 30, at 1311 (describing the consequences of Arthur Andersen's demise). There were individuals within the Justice Department who wanted to indict HSBC but ultimately the Justice Department was troubled by the collateral consequences of indicting HSBC. *See* Keefe, *supra* note 11 (regarding why collateral consequences were of such concern to the Justice Department).

is a safe bet.[103] Yet, many of the corporations that enter into DPAs fail to admit the extent of their wrongdoing and/or fail to name even one executive or director that was culpable for the corporation's misconduct, meaning this "safe bet" for the prosecution equates to a mere fine for the corporations.[104] Thus, notwithstanding the origins of DPAs, drug offenders are currently less likely to be offered DPAs than large corporations deemed "too big to jail."[105]

D. Attorney-Client Privilege in a Corporate Setting

Attorney-client privilege is one of the oldest privileges recognized in the United States.[106] The privilege was created to protect and prevent the disclosure of confidential communications made between an attorney and a client for the purpose of seeking legal advice.[107] It is deeply rooted in Anglo-American jurisprudence, where it was considered ungentlemanly for a lawyer to testify against his or her client.[108] The justification for the recognition of attorney-client privilege is primarily based on the need for confidence and trust within the relationship.[109] In order for a lawyer to advocate effectively and zealously

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[103] *See* Garrett, *supra* note 51, at 1791 (explaining that when prosecutors do charge individuals involved in corporate misconduct it often results in a significant number of losses). A DPA is considered a sure bet because the company must admit to certain facts and adhere to the conditions that the government sets, in contrast to the low conviction rate of individual prosecutions. *See id.* (explaining the benefits of DPAs). For example, in a study of convictions from 2001 to 2014, only 10% of individuals who allegedly engaged in corporate misconduct were convicted at trial. *Id.*

[104] *See* Keefe, *supra* note 11 (explaining that when corporations enter into DPAs, the corporations will often acknowledge some level of criminal wrongdoing yet not name one person who was responsible for that wrongdoing).

[105] *See id.* (noting that the Justice Department rarely offers DPAs to drug offenders even though DPAs were originally designed for drug offenses). DPAs were originally designed for first-time drug offenders and juveniles. *See* Uhlmann, *supra* note 30, at 1303 (describing the origins of DPAs).

[106] *See* Susan B. Heyman, *Corporate Privilege and an Individual's Right to Defend*, 85 GEO. WASH. L. REV. 1112, 1132 (2017) (providing a history of attorney-client privilege); Emily Jones, *Keeping Client Confidences: Attorney-Client Privilege and Work Product Doctrine in Light of* United States v. Adlman, 18 PACE L. REV. 419, 421 (1998) (detailing the importance and history of attorney-client privilege); *see Upjohn*, 449 U.S. at 389 (noting attorney-client privilege is the oldest privilege known in common law). Spousal privilege is another privilege that is rooted in English and American common law. *See* Kimberly Ann Connor, *A Critique of the Marital Privileges: An Examination of the Marital Privileges in the United States Military Through the State and Federal Approaches to the Marital Privileges*, 36 VAL. U. L. REV. 119, 134 (2001) (explaining spousal privilege). Historically, spouses were considered to be incompetent to testify for or against their spouse because a husband and wife were considered one person. *See id.* (describing the evolution of spousal privilege).

[107] *See* Heyman, *supra* note 106, at 1132 (detailing attorney-client privilege).

[108] *See id.* at 1133 (reflecting an overview of the importance of attorney-client privilege); Jones, *supra* note 106, at 421–22 (noting that the attorney-client privilege was created to prevent an attorney from testifying against his client because it would violate his honor as a gentleman).

[109] *See Upjohn*, 449 U.S. at 389 (finding the attorney-client privilege is necessary to "encourage full and frank communication between attorneys and their clients"); Trammel v. United States, 445 U.S. 40, 51 (1980) (noting that the attorney-client privilege is based on the need for confidence and trust in the attorney-client relationship); Jones, *supra* note 106, at 424 (explaining that *Upjohn* found

for his or her client, a client must trust the attorney enough to speak candidly and openly.[110] Although the attorney-client privilege has been codified under many state laws, Congress chose to allow federal courts to develop the privilege in "light of reason and experience."[111]

To invoke attorney-client privilege, four elements must be met: (1) it must be a communication; (2) made between an attorney and his or her client; (3) in confidence; (4) for the primary purpose of seeking legal advice.[112] Historically the privilege was held by the attorney, however, today it is held by the client.[113] Therefore, the client is the one to decide whether to assert or waive the privilege.[114]

The attorney-client privilege is not limited to individuals—it can also be asserted by corporations.[115] In 1981, in *Upjohn v. United States*, the United States Supreme Court extended this privilege to cover communication made by employees of the corporation.[116] Instead of drafting a set of rules that applied to all situations involving statements made by a corporation's employees to its counsel, the Supreme Court dictated that this must be decided on a case-by-

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that attorney-client privilege is needed to ensure honest and complete communication, thus enabling the lawyer to provide sound legal advice).

[110] *See Trammel*, 445 U.S. at 51 (explaining why attorney-client privilege exists); Heyman, *supra* note 106, at 1133 (detailing the importance of attorney-client privilege).

[111] *See Trammel*, 445 U.S. at 47 (noting the Federal Rules of Evidence provides the authority for federal courts to develop the testimonial privileges in criminal trials "in the light of reason and experience"). "In the light of reason and experience" means that federal courts are permitted to develop the rules of privilege flexibly and on a case-by-case basis. *See id.* (explaining the flexibility of attorney-client privilege). Having an open-ended privilege that should be interpreted according to reason and experience allows the privilege to change with time. *See id.* (defending why attorney-client privilege should evolve over time).

[112] *See* Heyman, *supra* note 106, at 1133 (detailing the four elements of attorney-client privilege). Although communications are protected between an attorney and client, the privilege does not protect the underlying facts. *See Upjohn*, 449 U.S. at 395 (noting that privilege only protects the communications and not the underlying facts); Brown, *supra* note 30, at 909 (noting the limitations of attorney-client privilege).

[113] *See* Jones, *supra* note 106, at 422 (explaining the history of attorney-client privilege); *see also* United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991) (noting that attorney-client privilege dates back to the 1600s). One theory is that attorney-client privilege was a response to testimonial compulsion that arose in Elizabethan England. *See* Jones, *supra* note 106, at 422 (describing why attorney-client privilege has remained so important in law).

[114] *See* Jones, *supra* note 106, at 422 (noting the client determines whether a communication made to his or her attorney may be disclosed or waived).

[115] *See Upjohn*, 449 U.S. at 390 (explaining the Court has settled that attorney-client privilege applies to corporations); Radiant Burners, Inc. v. Am. Gas Ass'n., 320 F.2d 314, 323 (7th Cir. 1963) (concluding attorney-client privilege extends to corporations); Jones, *supra* note 106, at 425 (explaining that attorney-client privilege can be used by a corporation); *see also* Heyman, *supra* note 106, at 1134 (noting *Radiant* was the first federal case to hold that the privilege applies to corporations).

[116] *See Upjohn*, 449 U.S. at 386 (holding that the communications by Upjohn's employees to counsel are protected by the attorney-client privilege).

case basis.[117] Despite the fact that communications by a corporation's employees to its counsel are protected under the attorney-client privilege, only the corporation holds the privilege and not the individual employee that made the privileged communication.[118] Thus, the corporation and not the individual employee maintains the power to either assert or waive the privilege.[119]

To understand why the Justice Department may rely on the waiver of attorney-client privilege, it is essential to understand how a corporation protects itself during an investigation.[120] When a corporation is implicated in misconduct, it often conducts an internal investigation.[121] A corporation protects itself during an investigation by directing its own attorneys to conduct the internal investigation, rather than a government agency.[122] Because the investigation is done by the corporation's counsel, the results of the internal investigation, meaning any interviews conducted during the investigation and/or memorandum related to the investigation, are protected by attorney-client privilege as

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[117] *See id.* at 396–97 (explaining the nuances of extending attorney-client privilege to corporations); Jones, *supra* note 106, at 425 (noting the Supreme Court found that corporation attorney-client privilege must be decided on a case-by-case basis). In a concurring opinion, Chief Justice Burger sought to create a general rule of what to test to determine if an employee's communication was privileged. *See Upjohn*, 449 U.S. at 403 (Burger, C.J., concurring) (explaining the general rule for an employee's communication to be privileged). His general rule considered communications to be protected by attorney-client privilege if: (1) the employee made the communication under the authorization of management; (2) the communication concerned matters within the scope of the employee's duties; and (3) the communication related to whether the employee's conduct would bind the corporation, assessing any legal consequences of that conduct, or creating a legal response to actions related to that conduct. *See id.* (detailing the test of privileged communication by an employee).

[118] *See Upjohn*, 449 U.S. at 389–90 (majority opinion) (explaining it is complicated that the corporation itself is the holder of the attorney-client privilege and not the employees).

[119] *See id.* (noting only the corporation can waive attorney-client privilege).

[120] *See* Copeland, *supra* note 58, at 1902 (detailing how a corporation protects itself during a government investigation).

[121] *See id.* (explaining that when a corporation is accused of misconduct, it conducts an internal investigation to prepare for potential litigation); *see also* American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307, 317 (2003) [hereinafter *Erosion of the Attorney-Client Privilege*] (noting that when a company learns of accusations of illegal conduct it will normally conduct an internal investigation to discover if it is substantiated or how large the extent of wrongdoing is and what the potential liability from it could be).

[122] *See* Copeland, *supra* note 58, at 1902 (explaining how a corporation acts when it receives notice it is being investigated); *Erosion of the Attorney-Client Privilege*, *supra* note 121, at 317 (noting corporations may conduct an internal investigation when they learn of a potential government investigation). A corporation protects the internal investigation by having it done by outside counsel and thus attorney-client privilege applies. *See* Copeland, *supra* note 58, at 1902 (explaining who conducts the corporation's internal investigation); *Erosion of the Attorney-Client Privilege*, *supra* note 121, at 317 (providing more details on internal investigations by corporations). One of the primary purposes of conducting an internal investigation is to determine the potential liability the corporation faces and prepare a defense for any misconduct. *See* Copeland, *supra* note 58, at 1902 (describing why a corporation conducts an internal investigation); *Erosion of the Attorney-Client Privilege*, *supra* note 121, at 317 (explaining the rationale behind internal investigations).

attorney work-product; thus, the corporation can protect itself by choosing not to reveal this privileged information.[123]

Because the documents in an internal investigation are protected by the attorney-client privilege, in order for the prosecutors to obtain the investigation results, the companies must waive said privilege.[124] A corporation is primarily motivated to waive the attorney-client privilege in exchange for a DPA or NPA.[125] Thus, the Justice Department is able to nudge corporations into a DPA in exchange for the confidential work product of the attorney.[126] The corporation must then do its own investigation of culpability and turn that privileged information over to the Justice Department.[127] After the Justice Department receives the results from the internal investigation, it will decide whether to prosecute the corporation or grant leniency in the form of a DPA or NPA.[128]

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[123] *See* Copeland, *supra* note 58, at 1902 (noting the results of the internal investigation, if done properly, are protected by attorney-client privilege). Copeland goes on to state that the only protection available to a corporation is the attorney-client privilege because corporations are not protected by the Fifth Amendment, the right to protect oneself against self-incrimination. *See id.* (explaining why attorney-client privilege is especially important to a corporation).

[124] *See id.* (describing how prosecutors would obtain the results of the internal investigation).

[125] *See id.* at 1910 (explaining that corporations often feel coerced to waive attorney-client privilege to receive cooperation credit); Zendeh, *supra* note 97, at 1456 (commenting that NPAs and DPAs are desirable because of the consequences a corporation could face if they are convicted). Corporations want a DPA or NPA so that they do not get indicted and risk the same fate as Arthur Andersen. *See* Zendeh, *supra* note 97, at 1456 (noting Arthur Andersen went bankrupt and ceased to exist after the government indicted it). Both Enron and Arthur Andersen ended up bankrupt after prosecution by the Justice Department. *See* Uhlmann, *supra* note 30, at 1311 (commenting on the demise that Enron and Arthur Andersen ultimately faced); *Enron: The Real Scandal*, THE ECONOMIST (Jan. 17, 2002), http://www.economist.com/node/940091 [https://perma.cc/25LH-PZ4M] (explaining the demise of Enron).

[126] *See* Garrett, *supra* note 51, at 1791 (providing why a corporation might agree to cooperate with prosecutors). A DPA is a sure deal because at trial there is no guarantee the corporation will be found innocent. *See id.* (finding that when individuals are prosecuted, there is a 10% chance the trial results in conviction). If a corporation is able to secure a DPA and follows the terms of the DPA, after a certain amount of time the charges will be dropped. *See Fokker*, 818 F.3d at 738–39 (describing that under a DPA, the prosecution initiates charges but agrees to dismiss).

[127] *See* Copeland, *supra* note 58, at 1902 (describing what corporations must do to receive cooperation credit under the Yates Memo). Even when a corporation does waive attorney-client privilege and enters a DPA or NPA, compliance requirements relating to the DPA or NPA are rarely adopted. *See* Garrett, *supra* note 51, at 1828 (noting the truth about DPAs and NPAs).

[128] *See* Copeland, *supra* note 58, at 1902 (explaining the processes of the Justice Department); Larkin & Seibler, *supra* note 40, at 30 (noting that because of the obstacles of prosecuting corporations and individuals within the corporation, it is not surprising that the government enlists private parties to do the investigating). Some critics argue that the Justice Department's reliance on internal investigations is not necessary and its heavy reliance on corporations' own internal investigations is the result of policy decisions made by the Justice Department. *See* Copeland, *supra* note 58, at 1902 (explaining the critiques of the Justice Department's reliance on internal investigations).

II. Reconciling Prosecuting Corporations with the Waiver of Attorney-Client Privilege

There is no question that the prosecution of a corporation can be tantamount to a "death sentence" which is why, in part, the Justice Department relies so heavily on DPAs.[129] Notwithstanding, the Justice Department's use of DPAs may encourage, if not demand, the waiver of attorney-client privilege that may be eroding one of the oldest privileges in law.[130] This portion of the Note proceeds in three sections.[131] The first section analyzes the difficulties in prosecuting corporations.[132] The second section discusses the problems with tying DPAs to the waiver of attorney-client privilege.[133] The last section describes the judicial branch's role in overseeing the DPAs that often result from the waiver of attorney-client privilege.[134]

A. The Challenges of Prosecuting Corporations

White collar crimes are notoriously difficult to prosecute because, unlike robbery or burglary, white collar crimes often involve complex fact patterns and may have vast collateral consequences.[135] As Deputy Holder explained,

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[129] Uhlmann, *supra* note 30, at 1303, 1310–11 (explaining that a criminal indictment was the equivalent to a death penalty for a corporation).

[130] *See* Garrett, *supra* note 51, at 1825 (detailing the critique of the Justice Department and its use of waivers); Jones, *supra* note 106, at 421 (explaining the history of attorney-client privilege).

[131] *See infra* notes 135–182 and accompanying text.

[132] *See infra* notes 135–148 and accompanying text.

[133] *See infra* notes 149–161 and accompanying text.

[134] *See infra* notes 162–182 and accompanying text.

[135] *See* Larkin & Seibler, *supra* note 40, at 26 (explaining why white collar crimes are difficult to prosecute); Keefe, *supra* note 11 (detailing why corporate bankers avoid jail). In the twenty-first century, the Department of Justice cracked down on corporate misconduct by prosecuting WorldCom, Enron, and Arthur Andersen. *See* Larkin & Seibler, *supra* note 40, at 17 (providing a history of corporate prosecution). The problem with prosecuting these corporations was that there were vast collateral consequences. *See id.* (explaining that as a result of the Arthur Andersen prosecution, around 28,000 employees lost their jobs and most employees had nothing to do with the Enron scandal and destroying documents). Due to the massive collateral consequences from the Enron and Arthur Andersen litigation, the Justice Department sought to use DPAs and NPAs to mitigate any future collateral consequences to innocent individuals, like employees and shareholders. *See* Uhlmann, *supra* note 30, at 1312 (noting the collateral consequences of prosecuting Enron and Arthur Andersen). Corporate prosecution is also so difficult because it takes an incredible amount of time and resources. *See* Garrett, *supra* note 51, at 1829 (finding that many of the prosecution losses of corporations can be attributed in some part to the vast amount of resources the defense has). For instance, Jeffrey Skilling, Enron's former CEO, was not sentenced until 2006 despite the prosecution beginning in 2002 and then had his sentence reduced in 2013. *See id.* (explaining the difficulties of prosecuting executives). Due to the Enron and Arthur Andersen collapses, prosecutors and the Justice Department have become reluctant to indict large corporations for fear they would drive them out of business too. *See* Alexander C. Kaufman, *How Obama's Failure to Prosecute Wall Street Set the Stage for Trump's Win*, Huffington Post (July 11, 2017), https://www.huffingtonpost.com/entry/chickenshit–club_us_5963fcc6e4b005b0fdc7bacb [https://perma.cc/PH9W-HT6B] (commenting on the lack of prosecution of the individuals responsible for the financial crisis under President Obama).

criminal prosecutions of the individuals responsible for corporate misconduct are often challenging due to the difficulty of establishing intent, the adequacy of written disclosures, and the reality of how far removed some executives can make themselves from the day-to-day operations of the company.[136] Even when prosecutors charge corporations and their executives, the prosecutors often lose, and even when they win, the individuals often get fairly light sentences, averaging only eighteen months.[137]

The challenges of prosecuting a corporation are further exemplified by the fact that a corporation is an artificial entity that somehow can be held criminally liable but physically cannot go to jail.[138] Therefore, the prosecution of a corporation often results in fines alone.[139] The corporation is held responsible for the acts of the individuals and the individuals can skate by with no consequences.[140] Meanwhile, the fines that the corporations have to pay hurt innocent shareholders rather than the individuals who were responsible for miscon-

[136] *See* Garrett, *supra* note 51, at 1824 (citing Deputy Holder's remarks on a speech about financial fraud). The Yates Memo also contains similar language explaining how difficult it is to prosecute high-level executives. *See* Yates Memo, *supra* note 57, at 2 (explaining it is difficult to determine who made corporate decisions at different levels of the corporation).

[137] *See* Garrett, *supra* note 51, at 1791–92 (finding that of the 10% of individuals convicted at trial, their average sentence was eighteen months which is substantially lower than the average sentence for most other federal crimes).

[138] *See* N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 494 (1909) (holding corporations could be held liable for criminal acts performed by employees); Garrett, *supra* note 51, at 1790; *see also* Larkin & Seibler, *supra* note 40, at 13 (explaining that holding corporations responsible for their employees' criminal actions prevented them from harming the public with no consequences). Corporations are easier to prosecute because they can be prosecuted if any individual committed a crime while in the scope of his or her employment, which provides leverage to prosecutors. *See* Larkin & Seibler, *supra* note 40, at 30 (explaining why prosecuting corporations should be easier). In fact, white collar defense lawyers believe that it is so difficult to prosecute individuals for corporate misconduct because the government does not have as much leverage over the individuals. *See* Garrett, *supra* note 51, at 1824 (providing the opinion of defense lawyers in why the Justice Department prosecutors face challenges in prosecuting individuals for corporate misconduct).

[139] *See* Garrett, *supra* note 51, at 1792–93 (detailing the common results of prosecuting corporations); Keefe, *supra* note 11 (commenting that no individuals went to jail after HSBC allegedly helped launder money into the U.S. financial markets for drug cartels and banned countries, and that instead the bank was fined $2 billion).

[140] *See* Garrett, *supra* note 51, at 1790 (detailing corporate prosecutions); Keefe, *supra* note 11 (explaining the reasons bank executives avoid jail); *see also* Eisinger, *supra* note 10 (noting that after HSBC allegedly helped launder money through the American financial system for drug cartels and banned countries, no executive was prosecuted and the company itself just had to pay a fine).

duct in the first place.[141] In fact, the majority of the time, no individual or corporate officer is prosecuted when corporations receive a DPA.[142]

For prosecutors who are not deterred by potential collateral consequences or the difficulty of prosecuting corporations, the fact that many large corporations are organizationally complex still makes it challenging to convict.[143] There are many layers to a corporation and most senior officers and directors have little to do with the day-to-day operations of the company.[144] Furthermore, even if the executives are involved in day-to-day operations, the directors and high-level executives are sophisticated enough to know how to appear to be separated.[145] Due to this organizational complexity, it is often difficult for prosecutors to prove executives had the mens rea necessary for conviction.[146] Further, the disparity in resources that the Justice Department has compared to the corporations it seeks to prosecute also makes it difficult to prosecute.[147] The Justice Department has a finite amount of resources, so it has to be strategic in which corporations it takes on.[148]

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[141] *See* Keefe, *supra* note 11; *see also* Garrett, *supra* note 51, at 1790 (explaining that corporations often act as the scapegoats for individuals when a corporation is criminally prosecuted). The fines hurt the shareholders because the corporation has to pay the fine which takes away from any profits. *See* Jill E. Fisch, *Criminalization of Corporate Law: The Impact on Shareholders and Other Constituents*, U. PA. J. BUS. & TECH. L. 91, 93 (2007) (noting that innocent constituents of corporations are punished for individual corporate misconduct).

[142] *See* Garrett, *supra* note 51, at 1791 (finding that about two-thirds of DPAs and NPAs entered into do not result in employees or officers being prosecuted).

[143] *See id.* at 1826 (describing how organizational complexity hides fault and although it might be obvious that some employees are at fault, determining who knew what at what time is extremely difficult). There is also a theory that if an employee's conduct is meant to benefit the corporation, then the corporation should be blamed and responsible for the harm that occurred. *See id.* (explaining theories of why a corporation is responsible for corporate misconduct by an employee).

[144] *See id.* at 1825 (quoting Attorney General Holder's opinion that top executives are often so insulated that it is difficult to distinguish their culpability versus the corporation's culpability); Yates Memo, *supra* note 57, at 2 (explaining the difficult task of determining which individual made corporate decisions for the corporation at which level).

[145] *See* Garrett, *supra* note 51, at 1825 (noting the sophistication of executives and officers at corporations); Kaufman, *supra* note 135 (explaining executives rarely follow threads that lead back to them); *see also* Copeland, *supra* note 58, at 1909 (finding that the Justice Department's policy of waiving attorney-client privilege creates an incentive for a corporation to sacrifice its employees to save itself).

[146] *See* Garrett, *supra* note 51, at 1832 (commenting that organizational complexity makes it difficult for prosecutors to prove intent of individuals because responsibilities are often shared); *see also* Yates Memo, *supra* note 57, at 2 (explaining the difficulty in establishing whether individuals had the knowledge and criminal intent when prosecuting corporations).

[147] *See* Garrett, *supra* note 51, at 1828–29 (noting that a substantial amount of resources would have to go into identifying the specific individuals responsible for the misconduct within a complex organization).

[148] *See* Holder Memo, *supra* note 43, § VI.B (explaining that waivers of attorney-client privilege allow the government to gather statements of potential witnesses and targets without having to negotiate with each of them individually); Larkin & Seibler, *supra* note 40, at 30 (explaining that, by requesting corporations to turn in the responsible individuals, the Justice Department is demonstrating

B. The Problem of Using DPAs That Encourage the Waiver of Attorney-Client Privilege

After Enron and the vast amount of criticism that the Justice Department received for the prosecution of Arthur Andersen, the use of DPAs when prosecuting corporations rose.[149] As DPAs became more frequent, it seemed the waiver of attorney-client privilege became more and more widespread as a precondition of cooperation in criminal prosecutions.[150] Even though the waiver of attorney-client privilege is considered voluntary, corporations often feel pressure to appear cooperative when faced with a governmental investigation.[151] No company wants a fate like Enron's or Arthur Andersen's.[152] Prosecutors maintain that the waiver of attorney-client privilege is not mandatory for a DPA or to avoid an indictment, yet, the pressure to disclose has not disappeared.[153] For instance, in a survey conducted in 2006, seventy-five percent of inside and outside counsel believed that the government expected a company under investigation to waive attorney-client privilege.[154]

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that it cannot or does not want to spend its own resources investigating these individuals); *see also Erosion of the Attorney-Client Privilege*, *supra* note 121, at 319 (commenting that the Justice Department's real intention in requesting attorney-client waivers from corporations is to make the government's job easier).

[149] *See* Griffin, *supra* note 53, at 323 (reflecting a summary of why U.S. Attorneys used DPAs and NPAs). Criminal trials were costly because of the collateral consequences that could result, such as the bankruptcy of a company. *See* Uhlmann, *supra* note 30, at 1303, 1310–11 (explaining a criminal indictment was the equivalent to a death penalty for a corporation).

[150] *See* Brown, *supra* note 30, at 898. *But see* Gideon Mark & Thomas C. Pearson, *Corporate Cooperation During Investigations and Audits*, 13 STAN. J. L. BUS. & FIN. 1, 26 (2007) (explaining that the Director of the Executive Office for U.S. Attorneys' law review article explained that based on empirical data, waivers of attorney-client privilege were the exception and not the norm). Critics of the Justice Department argued that the Justice Department created a "culture of waiver." *See* Garrett, *supra* note 51, at 1825 (detailing the critique of the Justice Department and its use of waivers).

[151] *See* Brown, *supra* note 30, at 899 (explaining that corporations feel extreme pressure to waive attorney-client privilege when facing a government investigation). Critics of the waiver of attorney-client privilege argue that the pressure to waive attorney-client privilege is eroding the foundation and policy behind attorney-client privilege. *See id.* at 900 (noting the perspective of critics). The 2008 Justice Manual even recognizes that a vast number of individuals in the legal community contend that the Justice Department's policies created pressure for corporations to waive attorney-client privilege. *See* Copeland, *supra* note 58, at 1910 (describing the Justice Department's concession on public opinion of waivers).

[152] *See 10 Years Later: What Happened to the Former Employees of Enron?*, *supra* note 2 (explaining that when Enron collapsed, it lost $60 billion in market value and thousands lost their jobs); *see also* Uhlmann, *supra* note 30, at 1311 (detailing that as a result of Arthur Andersen's indictment, 28,000 employees lost their jobs and the company subsequently filed for bankruptcy). It should be noted that federal prosecutors contend that the waiver of attorney-client privilege is never compelled or required. *See* Brown, *supra* note 30, at 899 (reflecting the Justice Department's contention).

[153] *See* Copeland, *supra* note 58, at 1910 (explaining the perceived pressure of waiver); Larkin & Seibler, *supra* note 40, at 31 (commenting that indictment by federal prosecutors was considered a death sentence).

[154] *See* Brown, *supra* note 30, at 936 (quoting the Department of Justice's statement that it does not require the waiver of a corporation's attorney-client privilege when accessing a corporation's

In light of the perceived pressure for corporate waivers of attorney-client privilege, there is a real problem that this pressure could be eroding the underlying policy values of the privilege.[155] The loss of attorney-client privilege in the corporate setting then makes it difficult for corporations to conduct accurate internal investigations because the employees can no longer trust that what they say will be kept confidential.[156] Yet, due to resource constraints, the government relies on this waiver to gain important and valuable information regarding the corporation's misdeeds, and thus a dichotomy of important interests emerges.[157]

In a corporate context, because the corporation holds the attorney-client privilege and not the individual, only the corporation can waive the privi-

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cooperation). *But see id.* at 899 (pointing to evidence that multiple surveys support the proposition that corporations feel like they must waive attorney-client privilege when faced with a government investigation); AM. CHEMISTRY COUNCIL ET AL., THE DECLINE OF THE ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE CONTEXT—SURVEY RESULTS 3–4 (Mar. 2006), https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=17390 [https://perma.cc/66HV-ENY4] (finding that 75% of inside and outside counsel that answered the survey believed that the government expected a company under investigation to waive attorney-client privilege or work product protections).

[155] *See* Brown, *supra* note 30, at 900 (describing why waiving attorney-client privilege has negative implications); AM. CHEMISTRY COUNCIL, *supra* note 154, at 3–4 (finding that the majority of lawyers who answered the survey contended that the government expected a waiver of attorney-client privilege or work product protections); *see also* Mark & Pearson, *supra* note 150, at 28 (discussing the 2006 American Chemistry Council survey). The underlying policy behind attorney-client privilege is to protect the disclosures made between an attorney and the client for the purposes of seeking legal advice. *See* Heyman, *supra* note 106, at 1132 (detailing the policy behind attorney-client privilege). In order for a lawyer to advocate zealously for his or her client, a client must be able to trust the lawyer enough to speak openly and honestly. *See* Trammel v. United States, 445 U.S. 40, 51 (1980) (explaining the reasons for attorney-client privilege). Additionally, when employees speak with the corporation's attorney, it is unlikely that they will have their own counsel present, which creates unfairness if the employees' interviews are turned over and possibly used against them. *See* Copeland, *supra* note 58, at 1909 (noting why waivers of attorney-client privilege with respect to corporations can be seen as unfair).

[156] *See* Brown, *supra* note 30, at 923 (explaining why the waiver of attorney-client privilege has implications on corporate internal investigations). For example, when employees know that their communications are not confidential, they will unlikely be inclined to speak honestly and openly if the information they share would reflect poorly upon them. *See id.* (noting why results from internal investigations may be incorrect). There is also a perceived pressure on employees that the company expects them to cooperate with an internal investigation and there could be consequences for not cooperating with the corporation's counsel. *See* Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157, 175 (1993) (detailing the pressures that employees face during internal investigations).

[157] *See* Copeland, *supra* note 58, at 1909 (explaining that with the waiver of attorney-client privilege in a corporate setting, the Justice Department is able to obtain the results from internal investigations without using its own resources). The waiver of attorney-client privilege puts a strain on the idea that a client should be frank and complete with the information that he or she provides to his or her attorney in order to ensure the best legal representation or advice. *See* Upjohn v. United States, 449 U.S. 383, 389 (1981) (finding the attorney-client privilege is necessary to "encourage full and frank communication between attorneys and their clients").

lege.[158] Yet, this creates somewhat of a paradox because a corporation is an artificial entity created by law and therefore the decision to maintain or waive privilege is made by the individuals authorized to act on behalf of the organization.[159] Therefore, a corporation itself cannot directly waive the attorney-client privilege; the directors and officers must waive the privilege.[160] This unique dichotomy becomes even more complex when a corporation (in reality its officers and/or directors) has the power to waive attorney-client privilege over communications between an employee of the corporation and the corporation's lawyer, and the employee objects to this waiver.[161]

C. Judicial Intervention Over the Waivers of Attorney-Client Privilege in Exchange for DPAs

Judicial intervention in the enforcement of DPAs is sparse—the majority of the time, DPAs are approved without controversy, even if they include a waiver of attorney-client privilege.[162] Due to the vast prosecutorial discretion over DPAs and NPAs, Congress proposed legislation to promote stricter judicial oversight over DPAs and NPAs.[163] The proposed legislation has been

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[158] *See* Commodity Futures Trading Commc'n v. Weintraub, 471 U.S. 343, 348 (1985) (concluding a corporation holds attorney-client privilege); *Upjohn*, 449 U.S. at 390 (reiterating that a corporation can hold attorney-client privilege); *see also* Carol A. Poindexter, *Parallel Proceedings: Internal Investigations and Waiver Issues*, 7 DRI'S FOR THE DEFENSE 57, 58 (July 2011) (explaining that a corporation can both assert and waive attorney-client privilege).

[159] *See* Brown, *supra* note 30, at 923 (illustrating the challenges of corporations waiving attorney-client privilege); Heyman, *supra* note 106, at 1139 (explaining the nuances behind waiving attorney-client privilege). This would normally be either the officers of the company or the directors. *See* Heyman, *supra* note 106, at 1139–40 (describing how corporations would waive attorney-client privilege). Officers or directors still must act in the best interest of the company when exercising a waiver or maintaining attorney-client privilege. *See id.* at 1140 (explaining the duties that officers have).

[160] *See* Weintraub, 471 U.S. at 348 (detailing how corporate attorney-client privilege is waived); Brown, *supra* note 30, at 923 (explaining how attorney-client privilege is waived); *see also* Heyman, *supra* note 106, at 1139–40 (explaining the counterintuitive idea that corporations hold attorney-client privilege yet the corporations cannot directly waive the privilege). Attorney-client privilege cannot be waived by lower-level employees because they are not the management of the company. *See* Heyman, *supra* note 106, at 1140 (noting which individuals can waive attorney-client privilege for a corporation).

[161] *See* RONALD J. COLOMBO, LAW OF CORPORATE OFFICERS AND DIRECTORS: RIGHTS, DUTIES, AND LIABILITIES § 10:13 (2017) (explaining the dynamics of a corporation waiving attorney-client privilege).

[162] *See* United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 46 (D.D.C. 2015) (concluding that until the Speedy Trial Act is amended by Congress to provide additional judicial review over DPAs, the court is limited in its power to review the merits of a DPA); Zendeh, *supra* note 97, at 1463 (noting the realities of DPAs). The district court in *Saena* explained that it does have the authority to reject a DPA that was not intended to rehabilitate a defendant's actions. *See Saena Tech Corp.*, 140 F. Supp. 3d at 13 (explaining the court's powers over DPAs).

[163] *See* Zendeh, *supra* note 97, at 1462 (noting Congress considered amending the Speedy Trial Act to give more power to judicial review under the Accountability in Deferred Prosecution Act in 2014).

largely unsuccessful, and thus any oversight over DPAs has come from the courts.[164]

For instance, in a 2014 case, Fokker Services, an aerospace service provider, was charged with conspiracy to violate and evade U.S. export laws by selling aviation and avionic parts to banned countries in the Middle East.[165] Despite this, the government agreed to a DPA that included a fine of $10.5 billion.[166] The United States District Court for the District of Columbia rejected the DPA.[167] The court defended this rejection by explaining that the DPA was "grossly disproportionate to the gravity of Fokker Services' conduct in a post 9-11 world" and because it would undermine the public's confidence in the law if it allowed the corporation to get away with such disgraceful conduct that benefited "one of the [United States'] worst enemies."[168] The court reasoned that a prosecutor has discretion upon whether to charge a corporation, but once the parties enter into a resolution that requires the court's approval, such as a

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[164] *See id.* at 1463 (explaining that the district courts do not often reject DPAs). Oversight over DPAs comes from the Speedy Trial Act. *See* 18 U.S.C. § 3161(h)(2) (2012) (requiring any delay during prosecution due to an agreement to be approved by the court); Zendeh, *supra* note 97, at 1464 (explaining that the Speedy Trial Act's language requires court approval before granting a motion to exclude time). Pursuant to the Speedy Trial Act, a criminal trial must begin within seventy days after the defendant is charged or makes his or her initial appearance. *See* United States v. HSBC Bank USA, N.A., 863 F.3d 125, 130 (2d Cir. 2017) (providing the procedure for the Speedy Trial Act). For a DPA to work as it was intended, the parties have to obtain a waiver from court exempting them from the Speedy Trial Act. *See id.* (explaining the Speedy Trial Act). Otherwise, a DPA would serve no purpose because if the parties do not receive an exemption from the Speedy Trial Act then the charges are subject to a mandatory dismissal after the seventy day period. *See id.* (describing the speedy trial act). Most DPAs call for monitoring that is far longer than seventy days. *See id.* at 128 (noting, for example, that the duration of HSBC's DPA was five years). Additionally, some courts have found that they have the power to reject a DPA under their supervisory authority. *See* United States v. HSBC Bank USA, N.A., No. 12-cr-763, 2013 WL 3306161, at *1, *4, *7 (E.D.N.Y. July 1, 2013) (concluding that a court has supervisory authority over a DPA when it "transgresses the bounds of lawfulness or propriety").

[165] *See* United States v. Fokker Servs. B.V., 79 F. Supp. 3d 160, 161 (D.D.C. 2015), *rev'd*, 818 F.3d 733 (D.C. Cir. 2016) (detailing what allegations Fokker faced). Fokker is an aerospace service provider. *See* FOKKER SERVICES, http://www.fokker.com/Fokker_Services [https://perma.cc/GV9C-2GTE] (providing more information about Fokker).

[166] *See Fokker Servs. B.V.*, 79 F. Supp. 3d at 166 (commenting that despite the shocking conduct over a significant period of time, the government agreed to a lenient DPA and did not prosecute any individuals for their personal misconduct in the conspiracy). In fact, there were employees directly involved in the misconduct that continued to work at the company. *See id.* (providing background information regarding the *Fokker* case).

[167] *See id.* at 167 (explaining that the court could not approve the DPA because the DPA was grossly disproportionate to the severity of the corporation's crimes). When a court does not approve a DPA, it denies the Motion for Exclusion of Time under the Speedy Trail Act. *See id.* (explaining the Speedy Trial Act).

[168] *See id.* (concluding that a fine below the revenue generated from this illegal conduct and a probation period less than eighteen months was not an appropriate exercise of prosecutorial discretion and thus, the court could not approve the DPA in its current form).

DPA, the court has "supervisory power" over that DPA.[169] In the case of DPAs, this power stems from the Speedy Trial Act.[170] Yet, on appeal, the District of Columbia Circuit found that the district court acted beyond its scope.[171] The appellate court vacated the district court's holding and held that the statutory language of the Speedy Trial Act tied the court's approval requirement to a DPA for the purpose of allowing the defendant to demonstrate his or her good conduct alone, and not to determine the merits of the DPA itself.[172]

Another instance of judicial intervention regarding a DPA was in *United States v. HSBC*.[173] HSBC allegedly violated the Bank Secrecy Act, the International Emergency Economic Powers Act, and the Trading with the Enemy Act by allowing illegal cartels and various banned countries to move their money into the United States through HSBC.[174] Instead of facing a trial and possible

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[169] *See id.* at 165 (finding that the district court has the power to reject or approve a DPA as a result of its supervisory power).

[170] *See id.* at 167 (concluding a court can decline to approve a DPA by denying a Motion for Exclusion of Time under the Speedy Trial Act); *see also* United States v. Fokker Servs. B.V., 818 F.3d 733, 739 (D.C. Cir. 2016) (explaining a DPA can only be used if there is an exclusion of time granted from the Speedy Trial Act). Normally, filing a charge or an indictment would trigger the Speedy Trial Act's seventy-day clock in which the trial must begin. *See Fokker Servs. B.V.*, 79 F. Supp. 3d at 167 (describing the procedural requirements relating to the Speedy Trail Act). With a DPA, however, the statute allows the exclusion of the seventy-day clock in order to effectuate the DPA agreement. *See id.* (explaining the Speedy Trial Act). For instance, if the statute did not allow an extension of the seventy day clock, after seventy days the charges could be dismissed without the defendant being compliant for the full length of the DPA. *See id.* (explaining how the Speedy Trial Act operates). The Speedy Trial Act of 1974 provides time limits for completing certain stages of a federal criminal prosecution. *See Speedy Trial*, 46 GEO. L.J. ANN. REV. CRIM. PROC. 448, 457 (2017) (explaining the Speedy Trial Act). For instance, the Speedy Trial Act requires an indictment to be filed within thirty days of an arrest or service of a summons on a defendant. *See id.* at 458 (detailing the nuances of the Speedy Trial Act). The Speedy Trial Act also specifies that a trial must commence within the later of seventy days of filing an indictment or within seventy days from the date the defendant first appeared before a judicial officer. *See id.* at 459. Courts have supervisory powers in order to protect the integrity of the judicial process. *See Fokker Servs. B.V.*, 79 F. Supp. 3d at 165; Peter R. Reilly, *Corporate Deferred Prosecution as Discretionary Injustice*, 2017 UTAH L. REV. 839, 847 (describing the court's powers).

[171] *See Fokker Servs. B.V.*, 818 F.3d at 750 (concluding the lower court went beyond its authority).

[172] *See id.* at 744–45, 751 (noting the court does not have the authority to rule over the merits of a DPA).

[173] *See HSBC Bank USA, N.A.*, 2013 WL 3306161, at *6 (concluding that the court had power to exercise its authority over a DPA).

[174] Bank Secrecy Act, 31 U.S.C. §§ 5311–5332 (2012); International Emergency Economic Powers Enhancement Act, 50 U.S.C. §§ 1701–1707 (2012); Trading with the Enemy Act, 50 U.S.C. §§ 4301–4341 (2012); *see HSBC Bank USA, N.A.*, 863 F.3d at 129–30 (describing HSBC's alleged criminal conduct). It was alleged that around $881 million in drug trafficking proceeds were laundered through HSBC. *See HSBC Bank USA, N.A.*, 863 F.3d at 130 (describing the crimes that HSBC allegedly committed). HSBC also allegedly allowed a Saudi bank with connections to al Qaeda to move money into the United States. *See* Keefe, *supra* note 11 (detailing more of HSBC's alleged behaviors).

conviction, HSBC entered into a five-year DPA with the Justice Department.[175] In ultimately approving this DPA between the Justice Department and HSBC, Judge Gleeson of the United States District Court for the Eastern District of New York found that the district court had the power to approve or reject a DPA.[176] Although this conclusion itself was rather novel, what was even more remarkable was Judge Gleeson's commentary.[177] Specifically, Judge Gleeson explained that a court has the power to reject a DPA when the requirements of cooperation violate the company's attorney-client privilege.[178] The United States Court of Appeals for the Second Circuit ultimately disagreed.[179] The appellate body reasoned that the supervisory power doctrine should be used

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[175] *See HSBC Bank USA, N.A.*, 863 F.3d at 129 (acknowledging the DPA that HSBC entered into); Steven M. Witzel, *Privilege Waivers' Role in Deferred and Non-Prosecution Agreements*, 250 N.Y. L. J., no. 47, Sept. 5, 2013, at 1, https://www.friedfrank.com/index.cfm?pageID=25&itemID=6781 [https://perma.cc/2EYX-QFTT] (noting a DPA between the Department of Justice and HSBC was approved by a district court judge on July 1, 2013). The DPA stated that HSBC would pay a $1.256 billion fine, fully cooperate with the government, adopt a compliance program and admit to a thirty-page Statement of Facts. *See HSBC Bank USA, N.A.*, 863 F.3d at 130 (providing the details of the DPA). In exchange for the cooperation, the DOJ would defer prosecution for five years and dismiss all charges if HSBC did not break any provisions in the DPA. *See id.* at 129 (providing the details of the HSBC DPA).

[176] *See HSBC Bank USA, N.A.*, 2013 WL 3306161, at *11 (concluding that the court had the authority to approve or reject a DPA based on its supervisory power). Despite both parties' contention that the court lacked authority over either the implementation or approval of a DPA, Judge Gleeson found that the supervisory power permitted federal courts to supervise "the administration of criminal justice" before them. *See id.* at *4–5 (explaining the court's powers). Judge Gleeson theorized that once the DPA was placed on the court's docket, the parties subjected themselves to the court's authority. *See id.* at *5 (concluding if the DPA made it onto the court's docket, the court had authority over it). Judge Gleeson found that his supervisory power came from U.S. Supreme Court cases that affirmed one of the purposes of supervisory power is to protect the integrity of the judicial process. *See id.* at *4 (describing where the court's supervisory powers came from); Reilly, *supra* note 170, at 847 (explaining one purpose of supervisory powers is to protect the judicial process).

[177] *See HSBC Bank USA, N.A.*, 863 F.3d at 131 (explaining that the district court understood its exercise of supervisory power over a DPA was an innovative and unique approach); *HSBC Bank USA, N.A.*, 2013 WL 3306161 at *6 (recognizing that the supervisory power over a DPA was novel and is normally requested by the defendant when the defendant suspects or alleges impropriety). Judge Gleeson found that when a DPA or its implementation transgressed the bounds of lawfulness or propriety, judicial intervention was necessary. *See HSBC Bank USA, N.A.*, 2013 WL 3306161 at *6 (describing when judicial intervention was needed over a DPA).

[178] *See HSBC Bank USA, N.A.*, 2013 WL 3306161 at *6 (explaining the numerous instances that might require the court to use its supervisory power).

[179] *See HSBC Bank USA, N.A.*, 863 F.3d at 135 (concluding the district court erred in recognizing the separation of powers by giving itself the authority to supervise the implementation of a DPA without evidence of wrongdoing); Copeland, *supra* note 58, at 1910 (explaining the Justice Department's policies have forced corporations to waive attorney-client privilege). The United States Court of Appeals for the Second Circuit conceded supervisory powers could be used by the court but they should be used infrequently. *See HSBC Bank USA, N.A.*, 863 F.3d at 136 (holding supervisory powers should be used in exceptional circumstances). The Second Circuit reasoned that exercising supervisory power over DPAs when there is no concrete evidence of impropriety turns the presumption of prosecutorial discretion upside down. *See id.* (concluding that to invoke supervisory power there had to be hard evidence of an impropriety).

cautiously.[180] It went on to state that the district court would have reason to invoke its supervisory power over the implementation of a DPA if there was actual evidence of misconduct, but the court cannot invoke its supervisory power "just in case" there might be misconduct.[181] For instance, the Second Circuit theorized that if the district court had actual knowledge that the Justice Department forced a corporation to waive attorney-client privilege, that might be enough to invoke the court's supervisory power over the DPA.[182]

III. Congress Must Act to Protect the Public from Corporate Misconduct

Attorney-client privilege is one of the most fundamental and historical privileges recognized in law, yet, it is slowly eroding because of the pressure that corporations feel to waive this privilege when being investigated.[183] If the government is serious about deterring corporate misconduct, it must start prosecuting high-level executives by conducting its own investigations and not relying on corporations to waive attorney-client privilege.[184] If the government cannot conduct its own investigations, Congress must step in to prevent attorney-client privilege from disappearing in a corporate context.[185] This portion of the Note proceeds in three parts.[186] The first section argues that allowing corporations to waive attorney-client privilege erodes the fundamental principles underlying the privilege.[187] The second section avers that the Justice Department should conduct its own investigations in order both to preserve the attorney-client privilege and to hold individuals responsible for corporate mis-

[180] *See HSBC Bank USA, N.A.*, 863 F.3d at 135 (explaining the supervisory power doctrine is a remarkable judicial power that should be used infrequently).

[181] *See id.* at 137 (finding that the court cannot monitor DPAs based on the hypothetical situation where misconduct could occur).

[182] *See id.* (explaining that if there was actual misconduct by the prosecutor in entering the DPA, the district court might have the power to invoke its supervisory power).

[183] *See* Upjohn v. United States, 449 U.S. 383, 389 (1981) (noting attorney-client privilege is the oldest privilege known in common law); Brown, *supra* note 30, at 936 (explaining the emphasis the Holder Memo places on waiving attorney-client privilege); Heyman, *supra* note 106, at 1132–33 (explaining how attorney-client privilege has its origins in Anglo-American jurisprudence); Mark & Pearson, *supra* note 150, at 1 (finding that from 1997 to 2007 the prosecution of corporations was characterized by the erosion of attorney-client privilege).

[184] *See* Zales, *supra* note 8, at 179 (explaining that to deter corporate misconduct, executives need to be scared of breaking the law); Kaufman, *supra* note 135 (corporations are unlikely to waive attorney-client privilege when the investigation leads to the executives and CEOs).

[185] *See* Garrett, *supra* note 51, at 1795 (explaining the idea that lower-level employees get sacrificed when corporate management waives attorney-client privilege); *see also* United States v. Wells Fargo Bank, N.A., 132 F. Supp. 3d 558, 566–67 (S.D.N.Y. 2015) (concluding that Wells Fargo can elect to waive its attorney-client privilege, not an employee).

[186] *See infra* notes 190–220 and accompanying text.

[187] *See infra* notes 190–204 and accompanying text.

conduct.[188] The third section proposes that Congress should enact a statute that either bars the waiver of corporate attorney-client privilege in exchange for a DPA or NPA or allows individuals to estop the government from using privileged information against them.[189]

A. Corporations Waiving Attorney-Client Privilege Erodes the Privilege Itself

The attorney-client privilege is one of the most established privileges in the United States.[190] It serves an effective role of encouraging frank and honest conversation with one's counsel, and without it, an attorney is limited in his or her ability to advocate zealously.[191] Few, if any, legal scholars or practitioners doubt how important the attorney-client privilege is, and yet its sanctity has drastically been minimized when it comes to corporations.[192]

More often than not, when there is an allegation of corporate misconduct, the corporation conducts an internal investigation.[193] In order to conduct a thorough investigation, there must be some expectation of confidence so that the counsel can obtain the relevant and accurate facts.[194] The issue with internal investigations is that the attorney-client privilege belongs to the corporation, meaning the corporation can choose to waive it and turn over protected

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[188] *See infra* notes 205–208 and accompanying text.

[189] *See infra* notes 209–220 and accompanying text.

[190] *See* Heyman, *supra* note 106, at 1132–33 (noting how the attorney-client privilege is rooted in Anglo-American jurisprudence and is one of the most important privileges). Congress has allowed the attorney-client privilege to evolve with the times by not codifying and instead allowing it to develop in the federal courts according to reason and experience. *See* Trammel v. United States, 445 U.S. 40, 47 (1980) (explaining the adaptability of attorney-client privilege).

[191] *Upjohn*, 449 U.S. at 389 (finding the attorney-client privilege necessary to ensure candid and honest communication between an attorney and his or her client); *Trammel*, 445 U.S. at 51 (explaining why attorney-client privilege is necessary); Heyman, *supra* note 106, at 1133 (describing the importance of attorney-client privilege).

[192] *See* Brown, *supra* note 30, at 900 (noting that some find that the Justice Department's pressure to waive attorney-client privilege is eroding the foundation and policy behind attorney-client privilege); *Developments in White Collar Criminal Law and the Culture of Waiver*, *supra* note 25, at 203–04 (explaining that the Justice Department's policy is forcing corporations to waive attorney-client privilege).

[193] *See* Copeland, *supra* note 58, at 1917 (commenting that when a corporation hears of misconduct, it often conducts an internal investigation to see what the potential costs will be). The investigation is conducted by counsel and therefore protected by attorney-client privilege. *See id.* at 1902 (describing an internal investigation). Corporate internal investigations are important because they allow a corporation to determine who was responsible for any misconduct and what liability could result from that misconduct. *See id.* at 1917 (noting the importance of internal investigations).

[194] *See Upjohn*, 449 U.S. at 389 (detailing why attorney-client privilege is necessary); *Trammel*, 445 U.S. at 51 (for why attorney-client privilege is important); Heyman, *supra* note 106, at 1133 (explaining that there needs to be complete honesty for attorneys to advocate zealously for their clients).

communications by its employees to the government.[195] Employees often feel pressure to participate in internal investigations, but if an employee knows that a corporation may waive privilege and turn the information over to the prosecution, there is less of an incentive to be frank with the corporation's attorney, which may lead to an investigation that is not entirely accurate.[196] This slippery slope continues when this potentially inaccurate investigation is turned over and relied upon by the Justice Department when a NPA or DPA is agreed to.[197] Essentially, corporations are getting lenient deals, and employees are potentially being prosecuted, based on a potentially faulty internal investigation.[198]

Furthermore, when a corporation is allowed to waive its attorney-client privilege, the people deciding to waive this attorney-client privilege are the executives and directors.[199] This puts the executives and directors at an extremely unfair vantage point because, if the results of the investigation lead back to them, they likely would not waive the privilege.[200] Alternatively, if the results lead to a lower-level employee who is not involved in the decision-making process of waiving the attorney-client privilege, the executives are likely to waive the attorney-client privilege and get a better deal for the corporation.[201]

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[195] *See* Heyman, *supra* note 106, at 1140 (explaining that the decision to waive privilege is made by the corporation's management).

[196] *See* Brown, *supra* note 30, at 923 (commenting that when employees know what they say is not protected by attorney-client privilege it defeats the justification for attorney-client privilege); Thornburg, *supra* note 156, at 175 (noting employees often feel pressure to cooperate in internal investigations for fear of getting fired or looking uncooperative).

[197] *See* Copeland, *supra* note 58, at 1901–02 (commenting that the Justice Department significantly relies on corporations turning over their internal investigations); Larkin & Seibler, *supra* note 40, at 30 (noting that because of the obstacles of prosecuting corporations and individuals within the corporation, it is not surprising that the government enlists private parties to do the investigating); Thornburg, *supra* note 156, at 175 (explaining that legal advice based on incomplete facts can be unreliable). Often times corporations will waive attorney-client privilege in order to obtain an NPA or DPA. *See* Brown, *supra* note 30, at 898–99 (providing the reasons a corporation might waive attorney-client privilege).

[198] *See* Thornburg, *supra* note 156, at 175 (explaining that if employees are not honest with the corporation's counsel then the lawyer's advice is only based on part of the relevant facts). It also poses problems for the corporation if there are not proper incentives to encourage its employees to be honest with its counsel. *See id.* (commenting on the problems associated with the waiver of attorney-client privilege as it relates to corporations).

[199] *See* Commodity Futures Trading Comm'n. v. Weintraub, 471 U.S. 343, 348 (1985) (explaining that a corporation's management has the power to waive attorney-client privilege). The corporation's management is usually its directors and officers. *See id.* (providing background on the corporation's management).

[200] *See* Kaufman, *supra* note 135 (noting the power that executives have over attorney-client privilege for corporations).

[201] *See id.* (explaining the consequences that the lower-level employees face if attorney-client privilege is waived for the corporation).

In order to deter criminal behavior, the executives need to be scared.[202] Although the benefits of waiving attorney-client privilege in order to get a better deal cannot be denied, it is insufficient to deter future misconduct.[203] If anything, this system allows executives to use the attorney-client privilege as both a shield and a sword—thereafter, the decision to break the law may be evaluated as nothing more than the cost of doing business, not a punishment.[204]

B. The Justice Department Must Conduct Its Own Investigations to Ensure Individuals Are Held Responsible

The Justice Department should be conducting its own investigations to reduce the potential of a coerced waiver of attorney-client privilege.[205] If the Justice Department is serious about deterring future corporate crime, it needs to switch its current approach of relying on what the executives and officers of corporations allow it to know and perform its own investigative work.[206] Although it will take more resources, the Justice Department has been effective in the past working with lower-level employees and granting them immunity in order to assure their cooperation against higher-level culpable employees.[207] By conducting its own investigations, not only will the Justice Department

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[202] *See* Zales, *supra* note 8, at 179 (commenting that executives should have a fear of being punished in order to deter corporate misconduct).

[203] *See* Copeland, *supra* note 58, at 1910 (commenting that corporations often feel coerced to waive attorney-client privilege to receive cooperation credit); Zales, *supra* note 8, at 179 (explaining that there needs to be real consequences for corporations if they are involved in criminal misconduct).

[204] *See* Kaufman, *supra* note 135 (finding executives were not prosecuted after the financial crisis and just paid fines); Larkin & Seibler, *supra* note 40, at 32 (explaining the Yates Memo creates a problem if corporate management is skilled and able to sacrifice lower-level employees). If corporations know that if they waive attorney-client privilege they will get an NPA or DPA and only have to pay a fine, the executives or directors could abuse this leniency by the Justice Department and not allow the internal investigation to lead back to them, thus getting away with nothing more than a slap on the wrist. *See* Kaufman, *supra* note 135 (noting how most corporations just had to pay fines after the financial crisis). The executives and officers use the attorney-client privilege as a shield when they assert it to protect themselves from their wrongdoings and use it as a sword when an investigation does not lead back to them by turning it over to the government in favor of a better outcome. *See id.* (commenting on how the corporations may just pay fines rather than face punishment); Garrett, *supra* note 51, at 1795 (explaining that because the executives are negotiating with the prosecutors there is an incentive to sacrifice lower-level employees in order to save themselves).

[205] *See* Brown, *supra* note 30, at 909 (describing critiques of waiver of attorney-client privilege for corporations); Copeland, *supra* note 58, at 1916 (noting that corporate internal investigations are basically conducted for the government, therefore a corporation's counsel is more or less an agent for the government).

[206] *See* Zales, *supra* note 8, at 179 (finding that to deter corporate misconduct, executives need to be scared of breaking the law); Kaufman, *supra* note 135 (explaining corporations are unlikely to waive attorney-client privilege when the investigation leads to the executives and CEOs).

[207] *See* Bayot & Farzad, *supra* note 4 (detailing the sentencing of a WorldCom former executive). In the prosecution of WorldCom, the Justice Department was able to prosecute the CEO by providing employees lower on the corporate ladder with immunity or lenient deals in exchange for cooperation. *See id.* (explaining how the Justice Department was able to prosecute the former CEO of WorldCom).

have a better chance at deterring future misconduct, but it will also preserve the sanctity of attorney-client privilege.[208]

C. Congress Must Act to Prevent the Corporate Waiver of Attorney-Client Privilege

If corporations continue to be encouraged, whether explicitly or implicitly, to waive attorney-client privilege in exchange for better plea deals or outcomes, legislation should be passed to allow individuals to estop the government from using that privileged information against them.[209] Employees cannot protect the sanctity of attorney-client privilege in a corporate setting because the privilege belongs to the corporation, not the employees.[210] Employees can be put in incredibly tough situations where they are pressured into talking with corporate counsel because they depend on the corporation for their job and are worried about the consequences of appearing uncooperative.[211] On the one hand, this pressure may force employees to incriminate themselves because any of the protected information with the corporation's counsel can be waived by the corporation.[212] On the other hand, the knowledgeable employees who know their conversations are not protected may not communicate unfavorable information in an internal investigation.[213] This potentially inaccurate information can then be leveraged by the corporation to obtain a DPA, as a corporation facing a possible indictment will try to avoid a death sentence like

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[208] *See* Zales, *supra* note 8, at 179 (finding executives must be punished to deter future corporate crime). If the Justice Department conducts its own investigation, it will not need to rely so heavily on the corporation's internal investigation and thus the perceived coercion of pressing corporations to waive attorney-client privilege will be eliminated. *See* Copeland, *supra* note 58, at 1901 (explaining how the Justice Department relies on the results from internal investigations); *see also* Brown, *supra* note 30, at 899 (explaining that when faced with a government investigation, corporations often feel severe pressure to waive attorney-client privilege).

[209] *See* Garrett, *supra* note 51, at 1795 (explaining the idea that lower-level employees get sacrificed by corporate management); Kaufman, *supra* note 135 (noting high-level employees rarely are prosecuted post Enron). It is often the expendable and lower-level employees that get hurt when attorney-client privilege is asserted or waived. *See* United States v. Wells Fargo Bank, N.A., 132 F. Supp. 3d 558, 566–67 (S.D.N.Y. 2015) (finding that a lower-level employee could not waive the corporation's attorney-client to assert a defense to criminal charges).

[210] *See Wells Fargo Bank, N.A.*, 132 F. Supp. 3d at 566–67 (concluding that only Wells Fargo itself can elect to waive its attorney-client privilege, not an employee); Brown, *supra* note 30, at 923 (explaining the attorney-client privilege is for the corporations and not the individuals working for the corporation).

[211] *See* Thornburg, *supra* note 156, at 175 (noting employees often feel a sense of loyalty to their company and are worried about being seen as uncooperative).

[212] *See Wells Fargo Bank, N.A.*, 132 F. Supp. 3d at 566–67 (finding that an individual could not waive the corporation's attorney-client privilege even to assert a defense in order to escape criminal culpability).

[213] *See* Brown, *supra* note 30, at 923 (explaining employees are unlikely to disclose information that paints them in a negative light).

Enron's that results in the Justice Department's reliance on a possibly inaccurate and/or misleading internal investigation.[214]

Courts cannot be relied upon to protect the sanctity of attorney-client privilege either because it is fairly evident that the courts do not have the power to protect attorney-client privilege when it is waived in exchange for a DPA.[215] Thus, Congress must pass legislation that prevents corporations from waiving attorney-client privilege unless the employees can protect themselves and estop the government from using that privileged information against them.[216]

If Congress truly wants to deter corporate misconduct and avoid another situation like HSBC, where the individuals who laundered money for banks associated with terrorists and drug cartels got off scot-free, it must prevent the corporate waiver of attorney-client privilege.[217] This can be done with a statute similar to the proposed Accountability in Deferred Prosecution Act that would specifically bar the waiver of attorney-client privilege in exchange for a DPA or NPA.[218] If a statute was enacted to prevent this waiver of attorney-client privilege in exchange for a DPA or NPA, it would not only give the courts the power to protect against such waiver, but it would also protect the sanctity and the long-recognized importance of the privilege.[219] The Justice Department would, thus, be forced to conduct its own investigations so higher-level execu-

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[214] *See* Copeland, *supra* note 58, at 1909 (explaining that with the waiver of attorney-client privilege in a corporate setting, the Justice Department is able to obtain the results from internal investigations without using its own resources); Larkin & Seibler, *supra* note 40, at 31 (finding that in the last decade, corporations often enter into a pretrial settlement and pay a fine rather than face the prospect of a conviction due to fear that it equates "to a virtual death sentence for business entities"). The waiver of attorney-client privilege puts a strain on the idea that a client should be candid and complete with the information that he or she provides to his or her attorney in order to ensure the best legal representation or advice. *See Upjohn*, 449 U.S. at 389 (finding the attorney-client privilege is necessary to "encourage full and frank communication between attorneys and their clients").

[215] *See* United States v. HSBC Bank USA, N.A., 863 F.3d 125, 135 (2d Cir. 2017) (finding that the district court cannot invoke its supervisory power over a DPA without a showing of misconduct); United States v. Fokker Servs. B.V., 818 F.3d 733, 744–45 (D.C. Cir. 2016) (explaining a court cannot reject a DPA because of its own opinions about the criminal charges); United States. Saena Tech Corp., 140 F. Supp. 3d 11, 46 (D.D.C. 2015) (concluding that Congress must amend the Speedy Trial Act in order to allow more judicial oversight over DPAs).

[216] *See* Copeland, *supra* note 58, at 1918–19 (explaining that an employee may not know that a corporation's interests are not aligned with his or hers during an internal investigation and is not provided with his or her own attorney and the protections of the Fifth Amendment).

[217] *See* Keefe, *supra* note 11 (explaining no executive was prosecuted as a result of HSBC's misconduct and the corporation only had to pay a fine that equated to one month's worth of profits).

[218] *See* Zendeh, *supra* note 97, at 1462 (explaining that the proposed Accountability in Deferred Prosecution Act had a section that recommended judicial approval for DPAs).

[219] *See id.* (noting Congress considered altering the Speedy Trial Act to give more power to judicial review over DPAs). Barring the corporate waiver of attorney-client privilege would also allow employees to fully disclose relevant information to the corporation's counsel and thus enable counsel to represent the corporation with accurate and complete knowledge. *See* Thornburg, *supra* note 156, at 175 (noting the benefits of forbidding corporations to waive attorney-client privilege).

tives could be prosecuted, and corporate misconduct could be further deterred.[220]

CONCLUSION

Corporations should not be allowed to waive their attorney-client privilege because it violates the founding principles behind the creation of the privilege. If a corporation can waive this privilege, and in many cases is encouraged to waive this privileged information, then either the information that employees tell the corporation's counsel during an internal investigation may hurt the individual or that information may be untruthful. Therefore, the Justice Department's reliance on the waiver of attorney-client privilege by the corporation is misplaced and hinders justice.

If corporations continue to waive attorney-client privilege in hopes of obtaining a more lenient deal, then the legislative or executive branch must protect the individuals to whom that privileged information was revealed. The Justice Department needs to protect these individuals by conducting their own independent investigations into corporations' misdeeds to ensure the low-hanging employees are not the only individuals being prosecuted. Congress should further protect the individuals by enacting a statute that bars the waiver of the attorney-client privilege in exchange for a DPA.

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[220] *See* Copeland, *supra* note 58, at 1901 (commenting that the Justice Department relies on internal investigations). If attorney-client privilege is not waived, then the Justice Department cannot rely so heavily on the results of internal investigations. *See id.* (providing more information on how the Justice Department obtains the results of internal investigations); Zales, *supra* note 8, at 179 (explaining that to deter corporate misconduct, executives need to be scared of breaking the law).